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THE COVENANT OF THE LEAGUE OF NATIONS AND WAR.

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THE object which the makers of the Covenant of the League of Nations proposed to themselves was 'to promote international co-operation and to achieve international peace and security.' The first of the means by which this object was to be attained was, according to the preamble of the Covenant, 'the acceptance of obligations not to resort to war'; the operative part of the Covenant, following the preamble, in several passages expressly binds the members of the League 'not to resort (or 'not to go') to war.'[1]

It is proposed in what follows to inquire what is the meaning of this phrase 'resort to war' as used in the Covenant. I do not seek the answer to the more general and more difficult question,[2] what, as a matter of international law apart from the Covenant, is the meaning of the word 'war' and what are the conditions necessary for the international existence of war; the uncertainty in which the answer to this general question is involved creates the practical difficulty of the interpretation of the Covenant, but it is not necessary to determine the answer to

[1] The text of what are believed to be the material portions of the Covenant will be found on pp. 18—21, *post.*

[2] On this general question see, amongst recent publications, Professor Brierly, 'International Law and Resort to Armed Force,' this Journal (1932), IV, p. 308; Dr. McNair, 'The Legal Meaning of War,' Grotius Society Publications for 1926; Professor Quincy Wright, 'When Does War Exist?' American Journal of International Law, vol. xxvi (April, 1932), p. 362.

the general question before reaching a conclusion as to the Covenant.

That there should be a difficulty in interpreting a phrase apparently so simple as 'resort to war' may possibly come as an unpleasant surprise to those who have not given special attention to the point.[3] It is disquieting, to use no stronger term, for anyone who has not always present to his mind a lively sense of the difficulty of reducing complex situations to simple formulae, to be told that the interpretation of critical passages of the Covenant may often be uncertain, that the word 'war' is not quite so definite and clear-cut in its application as the popular mind may imagine, that there may be a meaning of the word for international jurisprudence which is not the same as the meaning which would be given to it by the ordinary man, that in certain conditions it may even be a matter of doubt whether the deliberate application of the armed forces of a State to achieve political ends, resisted by the equally deliberate application of the armed forces of another State, and carried to the point of the destruction on a large scale of human life and property,[4] is or is not a violation of the obligation of the Covenant not to 'resort to war' or not 'to go to war.'

It might have been supposed that as international law is usually divided into the Law of War and the Law of Peace, the distinction between War and Peace must as a matter of law be fundamental and that a reasonably competent lawyer could have no doubt in any given situation whether a State had 'resorted to war' within the meaning of the Covenant or, if the more general question is being considered, whether two States were or were not 'at war.' In fact, however, in many cases it is far from easy to be sure what is the legal result of the events which have happened. Nor is the difficulty the fault of the lawyers. Nations and statesmen have often in history been anxious to apply forcible pressure to another State without incurring the responsibility—a responsibility to which a certain odium attaches—of formally declaring war or recognizing that a state of war exists. This tendency has been specially strong

[3] Those who have given special attention to the point will be acquainted with the very able discussion of the matter in M. de Brouckère's Report to the Committee of the Council of the League, made between September and December, 1926 (No. 27 of A. 14, 1927, V, League of Nations Publications).

[4] The Chinese claim that in the Sino-Japanese conflict of 1931-2 in and near Shanghai their casualties in killed, wounded and missing, amounted to 24,000 officers, men and civilians. (League of Nations Publication, C. 663, M. 320, 1932, vii, p. 86.) They also give a figure of 1,500,000,000 Mexican dollars as material loss. Even if we allow for considerable exaggeration, especially in the latter figure, it is obvious that this conflict in its outward manifestations was not unlike 'war.'

where there has been a great preponderance of power. In such, and sometimes in other, cases the acting States have preferred to call the measures that they have taken by the elastic and often question-begging name of 'reprisals'; to take one specially interesting illustration, they had evolved before the entry into force of the Covenant, the theory and practice of the 'Pacific Blockade,' though they had not succeeded in raising it to the rank of an unquestioned international institution, at any rate so as to affect the rights of Powers not participating in the measures taken.

In these endeavours of statesmen before the entry into force of the Covenant of the League there was nothing that deserved adverse criticism. On the contrary, the attempt to find a method of enforcing international obligations without resort to war was wholly praiseworthy; the Concert of Europe with its attempt at the command of irresistible pressure for the enforcement of right, or what was thought to be right, was an effort to establish peaceably a form of international organization. The pacific blockades of Crete and Venezuela—to take two instances only—were in their intention peace making: they were intended to compel respect for international law. To procure compliance with the demands then made without a 'resort to war' was clearly desirable; the blockading Powers had no wish to assume the general liberty of the use of force against a weak State which would have resulted from a state of war, and the weaker Power had obviously no reason to expose itself to greater severities than it was actually suffering. The same principle was at work—perhaps subconsciously—in earlier days when the British, French and Russian fleets destroyed the Turkish fleet at Navarino without any precedent or subsequent declaration of war; on this occasion it was found possible to kill 7,000 or 8,000 men in a formal naval action without setting up the state of things to which international lawyers give the name of war. And if we go back into still earlier history we shall find that in practice the position between peace and war was often singularly ill-defined and indeterminate. Even in the eighteenth century, civilized Powers sometimes engaged in hostilities without any definite pronouncement of an intention to create a state of war. The battle of Dettingen was fought at a time when no war had been declared between England and France. Nor was this practice wholly obsolete in the twentieth century. Shortly before the entry into force of the Covenant we find an extraordinary situation existing in the relations between the Government which in fact was in control of Russia and the Powers

opposed to Germany in the world war: 'Fighting was proceeding on a front stretching from the Dvina to the Caucasus,' but 'there had been no declaration of war.' [5]

The Covenant has however, for States members of the League, produced a very important change in this matter. Before the Covenant, only the States parties to the dispute were directly concerned in deciding the question whether there was 'war' between them in the full sense of international law. If the Power attacked was entitled by treaty of alliance to call on a third Power for assistance in the event of 'war,' it was, according to received doctrine, at the choice of that Power to say that war existed and then to claim that the *casus foederis* had arisen. If either party to the conflict wished to demand from other States the observance of the rules of neutrality, it was master of the situation; it could by declaring war, or otherwise manifesting an intention to consider itself at war, bring about a state of formal war, with the usual consequences for third parties, if and when it wished to do so.[6] But third parties were not bound by any customary or conventional rule similar to Art. 16 of the Covenant, to investigate for themselves the question whether in fact there had been a 'resort to war' independently of any recognition by the belligerents that war existed; third parties had not to consider the question whether what had happened was an 'act of war' 'committed' against themselves. If the combatants indicated that war existed, the duty of neutrality arose for third States; in the absence of such indication, third States were legally not affected by the combat.

Thus, before the Covenant, the general question 'What is war?' was not necessarily a matter of immediate practical concern to statesmen. 'War' existed for third parties when the disputants—or, possibly, one of them—chose to give that name to the relations existing between themselves or when action affecting the rights of third parties, as, for example, the declaration of a blockade, showed that they considered a state of war to exist. Whether, *as between two hostile States*, war resulted when they were doing to each other (or possibly when one of them was doing to the other) acts of violence not distinguishable from the acts done in war, without giving to their mutual relationship the name of 'war,' was largely an academic question for international lawyers. And presumably the answer which a lawyer would give would depend mainly on whether

[5] *Memoirs of a British Agent.* Bruce Lockhart. London and New York: Putnam. 1932.

[6] Unless possibly the other State made no resistance.

he accepted an objective or a subjective test for the existence of war—a point on which there was not complete agreement among international lawyers.

It may be worth while to mention a few of the legal definitions of war, if only to illustrate the proposition that, as a matter of pure international law, the question 'What is war?' is not one of absolute simplicity.

Hall[7] defines war thus: 'When differences between states reach a point at which both parties resort to force, or one of them does acts of violence which the other chooses to look upon as a breach of the peace, the relation of war is set up . . .' a definition which is objective when both parties resort to force, but subjective where only one party so resorts and the decision rests with the other party. Westlake,[8] following Grotius, defines war as 'the state or condition of governments contending by force,' which is clearly an objective definition.

Oppenheim, on the other hand, would seem to belong to the subjective school. He defines war[9] as 'the contention between two or more States through their armed forces, for the purpose of overpowering each other, and imposing such conditions of peace as the victor pleases.' The statement of purpose which, as McNair observes,[9a] 'is not free from objection,' has at any rate the effect of requiring a subjective state of mind on the part of the contending States as a condition of legal war.

Fauchille is more difficult to classify. He says[10]: '*La guerre est un état de fait contraire à l'état normal de la communauté internationale qui est la paix, état de fait dont la résolution, la fin, le but ultime est cette paix elle-même.*' On this definition we cannot tell what war is unless we first know what peace is. But at any rate it would seem to be possible to be sure that war is a matter of '*fact*,' were it not that we are told that this matter of fact has a '*but*'—a word which would seem to imply the presence of a mind and of a purpose in that mind.

Now, if the test is objective, war exists as a matter of international law when certain things are done; the intention of the States engaged is irrelevant. You have only to draw up a complete list of those things—though that is not an easy task—and the law on this point is then neatly, as it were, codified

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[7] International Law (8th ed. 1924), Oxford Univ. Press. Ch. III, p. 81, s. 15.
[8] International Law (2nd ed.), vol. ii, p. 1.
[9] International Law (4th ed.), vol. ii, s. 54, p. 115.
[9a] *Op. cit.* p. 4.
[10] Droit International Public, tome ii, s. 1000.

and doubts resolved. If, however, the test is subjective, war exists when both—or possibly one—of the contesting States means it to exist, and the actual things done are irrelevant—even if these things amount to formal battles by opposing armies each fighting with the authority or without the disapproval of its own Government, as actually happened in the recent Sino-Japanese dispute.

Questions to be Determined.

The first question to which it is important that those who have to apply the Covenant should have an answer, is 'Which of these tests, the objective or the subjective, does the Covenant on its true interpretation apply, when it forbids a *resort to war*?' Is the Covenant concerned with a state of mind or with the existence of objective facts? If the answer given to the question is that the test is objective, a second question arises, 'What are the objective facts to which the term "resort to war" is applicable?'

First Question.

As to the first question, the submission here made is that the word 'war' in the phrase 'resort to war' or 'go to war' where used in the Covenant must be interpreted by an objective test. Let us look at the text of the Covenant.

Passing by, for the moment, the preamble, to which reference has already been made, we come to the language used in the operative part of the Covenant. We find that the covenanting parties agree (1) in Art. 12 [11] 'in no case to resort to war' until three months after an arbitral award or judicial decision or report by the Council, (2) in Art. 13 (4) not 'to resort to war' against a member of the League who complies with an award or judicial decision, (3) in Art. 15 (6) not to 'go to war' with any party to a dispute who complies with the recommendations of a unanimous report by the Council, (4) in Art. 16 (1) to take certain steps of a very serious character against any member of the League which should 'resort to war in disregard of its covenants under Arts. 12, 13, or 15.' (And this same Article proclaims that the thus covenant-breaking States shall '*ipso facto* be deemed to have committed an *act of war* against all other members of the League.') Lastly in Art. 17 (3) the covenanting parties agree that Art. 16 is to be applicable against a non-member State which 'shall resort to war against a member

[11] See for the text, pp. 19—21, *post*.

of the League.' It must also be remembered that Art. 11, though it does not speak of 'resort to war,' declares 'any war or threat of war' to be a matter of concern to the whole League.

Thus the operative clauses of the Covenant use the phrase 'resort to war' or 'go to war' (as the French text, by employing the same expression in each place—*recourir à la guerre*—shows, there is no difference of meaning between the two phrases) in five separate places, all in the group of Articles (12 to 17 inclusive) which deal expressly with international disputes and provide the formal machinery for their settlement. In each place there is a prohibition, either absolute or limited, of a 'resort to war.' Is what is prohibited such violent action as is normally characteristic of war without regard to the intention with which the action is taken, or must the action be accompanied or followed by an open (or implied) declaration of one or both of the States concerned that their relation is that of belligerency?

The first thing that may be observed is that in all these passages where this phrase 'resort to war' or 'go to war' is used the action forbidden is *unilateral* action; the Covenant contemplates that it is possible for a single Power to 'resort to war' against another Power.[12] It follows that for the purposes of the Covenant, we need not concern ourselves closely with the question whether one Power alone can create a state of war in the face of continued non-resistance by the Power attacked, or whether the adage that 'it takes two to make a quarrel,' applies to war also. This question has been put more than once very shrewdly by a Chinese representative; a Latin author put it into verse—'si pugna est ubi tu pulsas ego vapulo tantum'; Lord Stowell, it is generally believed, would have answered it in the affirmative.[13] But whatever may be the answer to this question, the meaning of the Covenant can hardly be open to dispute. 'Resort to war' is a unilateral act; if it is committed in certain conditions it involves according to the Covenant certain consequences for the Power which commits it; there is no hint or suggestion in the Covenant that those consequences are

[12] Even if any doubt could be felt on this head if Art. 12 is looked at by itself, Art. 16 makes it abundantly clear that the action forbidden is unilateral. You cannot reasonably have sanctions limited to one Power if the thing forbidden requires the combined action of two Powers.

[13] See *The Nayade* (1802) 4 C. Rob. p. 253, cited by McNair, 'The Legal Meaning of War'—Grotius Society Publications, 1926. But it may be observed that in this case there was evidence that a state of war in fact existed between Portugal and France, and Lord Stowell only says—it is submitted, by way of *dictum*—that 'in cases of this kind it is by no means necessary that both countries should *declare war*'—(italics not in the original report), implying only that action without declaration might be enough.

contingent on action taken or not taken by the Power against which war is resorted to. No doubt, for international law generally, war is 'not the mere employment of force, but the existence of the legal condition of things in which rights are or may be prosecuted by force,' [14] and as we have just seen it may be open to argument whether the action of one Power alone can produce such a legal condition.[15] But this question and these arguments are irrelevant for the interpretation of the Covenant. The Covenant contains a clear agreement by members of the League not to 'resort to war' against another member in certain definite circumstances; if the agreement is broken, an obligation arises at once for all other members of the League (Art. 16). The action of the member attacked is not made a condition of this obligation nor does the act agreed not to be done depend for its nature or quality upon the act of any member of the League other than the author of the act. This consideration—that the act forbidden is unilateral—points the way to an answer to the question whether the act of resorting to war is an objective fact, complete when certain things are done, or whether it must be the manifestation of an '*animus belligerendi*'—must, that is, be accompanied by a certain mental condition on the part of the responsible authorities of the acting State.

Let us always remember that this question is a practical problem of statesmanship; it has to be answered by statesmen in the condition of the world as it exists to-day. The document to be interpreted is one drawn up by statesmen to govern the action of statesmen, and here, if ever, it is legitimate to arrive at the true meaning of the text by asking what answer gives the more reasonable result.

Now there can be little doubt that if you insist that the existence of the *animus belligerendi*, in the sense of an intention to 'go to war,' must be found as a fact—and as the wittiest,

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[14] Moore's Digest, vii, 153, 154. Cited by Hyde, International Law, vol. ii, p. 189—*apud* McNair, p. 4.

[15] Thus McNair (p. 10) deduces four propositions from the authorities which he cites, including *The Nayade*, *ubi sup.*, but no one of them includes the proposition that the unilateral action of one State alone produces 'war.' On the other hand (p. 17), he submits that a state of war occurs when an act of force is done under the authority of a State '*animo belligerendi*.'

The Assembly of the League, at its second meeting in 1921, when laying down guiding principles for the application of Art. 16, expressly declared (Resolution of October 4, 1921) that the unilateral act of the covenant-breaking State, could not create a state of war; it only entitled the other Members of the League to resort to acts of war, or declare themselves to be in a state of war with the covenant-breaking State. (Assembly Resolution of October 4, 1921, League of Nations Publication, A. 14, 1927, v, p. 42.) This resolution is of very high authority. M. de Brouckère (*ubi supra*) calls the statement, that the unilateral act of one State cannot create a state of war, 'a truism.'

and one of the wisest, of English lawyers [16] remarked, 'the state of a man's mind is as much a fact as the state of his digestion'—you will involve statesmen in many cases in a difficult and very delicate inquiry.

The State which is taking the action alleged to be in violation of the Covenant as being a 'resorting to war' will, it is obvious, have made no formal declaration of an *animus belligerendi*; if it did so, the difficulty would not exist; it will for obvious reasons prefer to assert or let it be inferred that it has no intention to make war, when the establishment of the presence of such an intention will draw down upon it a risk of the sanctions of Art. 16. Thus, if the existence of the *animus belligerendi* on the part of the acting State has to be established, the application of Art. 16 will be rendered more difficult by the necessity of first proclaiming disbelief in what may be a formal declaration given by an independent Power.[17] Even apart from this special difficulty, an inquiry as to a state of mind is proverbially not easy—even if it be not wholly true that 'the intent of a man is not triable.' [18] And whose are the minds, in such a case, whose intentions we must investigate? Is it enough to look into the mind of a foreign minister, if indeed that is possible? In any case, as to any declaration made, there will be no opportunity for the use of the invaluable weapon of cross-examination.

Nor is this all: if an *animus belligerendi* must be established, what exactly does that phrase mean? Does it mean a conscious intention to carry on 'war' in the full sense of international law, or merely an intention to take violent action which in time

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[16] Lord Bowen (then Bowen L.J.) in *Edgington* v. *Fitzmaurice* (1885) L. R. 29 Ch. D. 459, 483.

[17] Instances have occurred in history in which one Power has declared that it interprets action by another Power which was perfectly compatible with the maintenance of peaceful relations, as an act of war or even as a declaration of war. And war has followed. Thus one Power has claimed to discover an *animus belligerendi* in the actions of another. Such incidents are interesting as evidence (1) of the desire of every State not to appear as first 'resorting to war,' (2) of the ease with which an *animus belligerendi* may be imputed and how offensive and how dangerous is the imputation, (3) of the difficulty of applying a formal test for the purpose of deciding which of two Powers 'resorts to war.' The question is always one of fact. But it must be observed that when an opposing Power interprets action taken by its adversary as an act of war, it has itself the intention *eo ipso* of declaring war. The situation of Members of the League in relation to an act that may or may not be an act of war by another Member is quite different. They have not to consider whether as a matter of their own policy they will declare war, but whether on the true interpretation of the Covenant there has been a 'resort to war' by another Power.

[18] *Per* Brian C.J. Y. B. 17 Edw. 4, Pasch. pl. 2. Holdsworth, 'History of English Law,' vol. iii, p. 374 (3rd ed. 1923. Methuen. London).

of peace would be illegitimate?[19] It is submitted that the latter alternative alone is correct. If we are to take the former alternative, we are making a requirement of intention which goes beyond any similar requirement of municipal law whether civil or criminal. It is not necessary to constitute the crime of larceny that the thief should intend to do something called by that name, nor is it a condition of civil liability for libel that a writer should be acquainted with the law of defamation. It is enough that the thief should do an act which the law calls larceny and that the libeller should without lawful excuse publish a writing untruly alleging of another person facts exposing him to hatred, ridicule or contempt. Action which involves a State in the risk of the sanctions of Art. 16 must of course be deliberate and intentional action, but if it be action taken deliberately and intentionally which objectively is of a violent character such as normally would be taken only in war, it is submitted that this is enough to constitute a 'resort to war' within the meaning of Arts. 12, 13, 15, 16 and 17 of the Covenant. What more, after all, could well be wanted? The acting State has done things which its opponent is at liberty to treat as initiating the state of war.

'War' must not be taken to be a kind of magic word—a 'Sesame' which must be pronounced aloud before the door of the powers of the Covenant can open.

Again, an inquiry into the mind of the Power that has taken action in order to discover whether it was or was not an *animus belligerendi*, may, according to received authorities, prove not to be directed to the right quarter. According to Hall's[20] statement of the conditions necessary to set up a state of war (and he is not alone in his view) it may be the *animus* of the State which suffers, and not of the State which does, the first act of violence which is material in order to determine whether war in the legal sense exists. 'The relation of war is set up,' says

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[19] It is pertinent to observe that this question of the meaning of the expression *animus belligerendi* may have special importance in connexion with a civil war. At the outbreak of the American Civil War the Northern States claimed that their military operations did not create a state of belligerency, and would, no doubt, have asserted quite truly that they had no *animus belligerendi* in the sense of carrying on what for international purposes was 'war.' On this showing, the *animus belligerendi* was present, if at all, on the side of the Southern States alone. The British argument that the institution of the blockade of the Southern ports was only consistent with the existence of a state of war was based on the assumption (which, it is submitted, is true), that a conscious intention to carry on war is not necessary to the existence of a state of war when the things done are only consistent with the existence of a state of war. (See, on this subject, *Great Britain and the Law of Nations*. H. A. Smith. London: P. S. King. 1932. Vol. i, pp. 302 and following.)

[20] *Ante*, p. 5.

Hall, when both parties resort to force '*or one of them does acts of violence which the other chooses to look upon as a breach of the peace.*' Thus if Greece had chosen to look on the bombardment of Corfu in 1923 as a breach of the peace, war would have resulted, even though Italy bombarded Corfu without any *animus belligerendi.* Italy bombarded Corfu deliberately, in conditions of considerable exasperation, with the intention of punishing Greece for assumed responsibility for the murder of Italian officers, and if Greece had supplied the necessary element of intention by regarding the bombardment as a breach of the peace a state of war in the full legal sense would have resulted. Such a case suggests forcibly that any inquiry into the intentions of the State that does the act of violence must be limited to ascertaining whether the act was deliberate; if the act was deliberate, the acting State has done all that need be done on its side to produce a state of war, in other words it has 'resorted to war' within the meaning of the Covenant. If this were not so, it would follow that if the State which is the victim of the act of violence resists by force and intimates that it considers itself at war, with the result that a state of war comes into existence, it is the victim who has 'resorted to war,' while the author of the violence has merely accepted the consequences of his opponent's 'resort.' Such a result is repugnant to a sense of justice, as more than one author has pointed out.[21]

If it is still felt to be doubtful, as a matter of interpretation of the operative clauses of the Covenant, whether the objective construction is right, it is legitimate to look for guidance to the preamble. According to the preamble the object of the Covenant is 'to achieve'—not simply to promote, but actually to achieve—'international peace and security' by, amongst other things, 'the acceptance of obligations not to resort to war.' It would, doubtless, be illegitimate to base an argument on the use of the word 'peace' in this passage, for if 'peace' exists merely by reason of the absence of war, it would beg the question at issue to allege that there is no 'peace' when in fact acts of international violence are committed. But the word 'security' raises different considerations. For 'security' is surely incompatible with the existence of a liberty to a neighbouring State to let loose international violence so long as it does not call it 'war.' The Covenant cannot 'achieve security' for members of the League if it allows other States, and particularly member

[21] See *e.g.* Schücking and Wehberg, Die Satzung des Völkerkundes (ad Art. 12 of the Covenant) (2nd ed. p. 509).

States, to invade their territory, bombard their towns and give battle to their troops without violating the obligations which it imposes.[22] The general spirit of the Covenant surely is to prevent men and women—whether Japanese, Chinese, Bolivian, Paraguayan, French or British—being killed deliberately by international action, except in so far as the instrument itself admits a resort to armed force. If the Covenant does not thus prevent, within the limits which are set to it, death and destruction, it has not given security. And which of the methods, whereby according to the preamble security is to be achieved, will prevent these deaths by violence if it be not the 'obligation not to resort to war?' 'Open, just and honourable relations between nations,' 'the understandings of international law,' 'the maintenance of justice' and 'a scrupulous respect for all treaty obligations' as these several matters were understood at the date when the Covenant took effect, gave no 'security' against invasion or bombardment; such security, on the true construction of the preamble, must be looked for in the obligation not to resort to war.

Fortunately, however, we are not confined to arguments from the text of the Covenant in our search for its practical, applied meaning. The League has been making its own 'case-law,' *jurisprudence* in the French sense, on the subject.[23]

Already in August, 1921, the report to the Council of the so-called 'Blockade Committee' treats the undertaking of 'armed action' as being, on the true interpretation of the Covenant, the operation described in Art. 16 as 'resort to war.'

> 'By the terms of the Covenant, a State which resorts to war against a State Member of the League, in violation of the provisions of Arts. 12, 13 and 15—*i.e. which undertakes armed action against that State*—is regarded as having committed an act of war against all the Members of the League.'[24]

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[22] If it is some obligation of the Covenant, other than the obligation not 'to resort to war,' which is violated, the sanction prescribed by the Covenant (last paragraph of Art. 16) is expulsion from the League. This would not seem an appropriate penalty. It certainly is not remedial in its operation.

[23] See on this point, the paper on 'The Weakness of Peace Machinery,' in the series of 'Foreign Policy Reports,' published by the (American) Foreign Policy Association, vol. viii, No. 14 (September 14, 1932).

[24] League of Nations Publication, A. 14, 1927, v, p. 17. Italics not in the original. The Members of the Committee were: MM. De Aguëro y Bethancourt (Cuba), Gout (France), Finlay, Sir William (Great Britain), Baroni, replacing Schanzer (Italy), Oka (Japan), Sparre (Norway), Garnica (Spain), Huber (Switzerland). The sittings were attended by Commendatore Anzilotti (then Under-Secretary-General of the League), and M. Hammarskjöld (then a Member of the Secretariat of the League) acted as Secretary.

Some two years later, in the Corfu [25] case already referred to, an exceptionally strong body of jurists reported that 'coercive measures *which are not intended to constitute acts of war* may or *may not* be consistent with the provisions of Arts. XII to XV of the Covenant.' The Council accepted this report, though it subsequently indicated that it did not make the opinions expressed its own. The opinion, however, is of singular weight by reason of its authorship. For our present purpose the capital importance of the opinion is that it definitely does not insist on the existence of the *animus belligerendi*; you may have a 'resort to war,' the opinion says in effect, even if the actors do not intend their action to constitute an act of war. The *animus belligerendi* is not essential.

A case, less striking but pointing in the same direction, was the Greco-Bulgarian affair in 1925. Greece, active on this occasion as she had been passive at Corfu, had sent military forces across the Bulgarian frontier by way of compelling Bulgaria to pay reparation for the death of a Greek soldier in an exchange of shots on the frontier. The Council of the League adopted a report containing what was in effect a censure of the Greek Government for 'causing its armed forces to cross the Bulgarian frontier.' [26] It may be inferred that in this particular case at any rate the violation of a frontier by armed forces was regarded as inconsistent with the obligations of the Covenant. What Greece did on this occasion is indeed a typical example of the action which the opposing State is, according to the text-books,[27] reasonably entitled to consider an act of war, and to meet by a declaration of war. The right to treat such an act as an act of war does not depend on the intention with which it is done; it is surely reasonable in such a case to regard the doer of the act as having 'resorted to war' before a similar resort by the opponent.

Another case of what is in effect an interpretation by the League of the provisions of the Covenant is that of Bolivia and Paraguay. The Council of the League on September 27, 1932, addressed to the two Governments 'a solemn reminder that they

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[25] See League of Nations Official Journal, April, 1924, p. 524. In connexion with this case the Article by Professor Charles De Visscher in the *Revue de Droit International et de Législation Comparée*, 3rd Series, vol. v, especially at pp. 377 and following, is of peculiar value and interest. M. De Visscher was a member of the Jurists' Committee. The other members were M. Adatci (Japan), Lord Buckmaster (British Empire),) M. Fromageot (France), M. Rolandi Ricci (Italy), M. Unden (Sweden), M. Villaurrutia (Spain), M. Van Hamel (Holland—Legal Department of the League).

[26] League of Nations Official Journal, February, 1926, p. 173.

[27] *E.g.* Oppenheim, ii, 23-4; Westlake, ii, § 55.

are legally and morally bound by their obligations to the League *not to have recourse to armed force* to settle the unhappy dispute which has arisen between them, but to refer it either to arbitration, to judicial settlement or to the Council.'[28] The Council thus solemnly declares that a 'recourse to armed force'[29] is inconsistent with the legal obligation contained in the Covenant. With what obligation of the Covenant can the resort to armed force be inconsistent if it be not the obligation 'not to resort to war'?

As an answer then to the first question—whether the test of 'resort to war' is objective or subjective, we may conclude that on the true construction of the Covenant, 'resort to war' is unilateral intentional action, of a violent or forcible character, taken by one State against another State. Such action need not be, or be accompanied by, the manifestation or even the existence of an intention to produce a war in the full legal sense, that is, a state of things in which two States are deliberately exercising mutual violence and requiring of other States the observance of 'neutrality.'

Second Question.

We now pass to the second question, namely, 'What are the objective facts which constitute a "resort to war"?' To this we have perhaps already seen the outline of the answer. The declaration of the Council in the Bolivia-Paraguay conflict condemning a 'recourse to armed force' as contrary to the obligation of the Covenant is as good a general statement as it is possible to produce. A minute examination of historical cases in which resort has been had to 'reprisals,' so called, would not be of great practical value to those who may have in

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[28] Quoted from the report in *The Times* newspaper, September 28, 1932. Italics not in the original.

[29] It is worth recalling that some earlier drafts of the Covenant used this phrase in place of 'resort to war.' The interpretation now given by the Council may serve as an illustration of the fragility of attempts to construct arguments on the basis of speculations suggested by *travaux preparatoires*, especially when they are incomplete. (See Foreign Policy Association Reports, *ubi supra*, and D. H. Miller, *The Drafting of the Covenant* (Putnam. New York, London, 1928), vol, ii, and cf. *e.g.* President Wilson's draft of January 20, 1919, p. 100, 'will in no case resort to armed force,' and p. 101, 'If any Power shall declare war or begin hostilities or take any hostile step short of war,' and the British draft of the same date, *ibid.* p. 109, 'will not . . . go to war.') For you may argue either (1) that the earlier draft was deliberately rejected on this point, and therefore the interpretation of the Council is wrong, or (2) that the final draft is to be interpreted by the earlier proposals, and therefore the interpretation of the Council is right. The author is assured by a friend who was in a position to be well acquainted with the history of the drafts of the Covenant, that so far as he knows the change was made without conscious reference to the problem discussed in the text.

the future to interpret the Covenant. Physical and material conditions change rapidly in the modern world. Exact precedents in any given state of modern facts are not easy to discover, and what is sometimes, but not always, the vital condition of prompt action is not compatible with the pursuit of difficult historical inquiries. Whether in any given case there has been a 'resort to war' is a question containing a large element of fact, and the facts of each case cannot be classified in advance.

The general justification of the Council's pronouncement is to be found in the text of the Covenant itself. Arts. 11 to 17 of the Covenant aim at the suppression of war, so far as was thought possible in 1919; Art. 12 in particular is aimed at the peaceable settlement of any dispute 'likely to lead to a rupture.'[30] A 'rupture' is thus the thing to be avoided. But a 'recourse to armed force' is the very type of the action which international lawyers recognize as either being in itself, or capable of resulting in, that ultimate form of 'rupture' to which we give the name of war; for if one Power resorts to armed force it lies in the choice of its opponent to turn the situation into war. 'Self-help' is the very thing which the Covenant is aimed at discouraging, for war is the normal form and result of international 'self-help.'

Confusion has been introduced into the discussion by the use of such phrases as 'legitimate defence,'[31] 'self-defence' and so on and by the persistent insistence on the idea of the 'aggressor.' The primary object of these Arts. 12 to 17 of the Covenant is to produce a peaceful and reasonable settlement of an international dispute, not to forbid one class of war, termed 'aggressive war,' and permit another type, styled 'defensive war.' The words 'aggressor' and 'aggression' nowhere occur in these Articles; in fact the only place in the Covenant where the word 'aggression' occurs is in Art. 10, and the word 'aggressor' occurs nowhere. Art. 16 prescribes 'sanctions' against a 'covenant-breaking State,' not against an 'aggressor.' The question under Art. 16 of the Covenant is not whether a State is acting defensively or aggressively, but whether it has 'resorted to war in disregard of its covenants.' State A may be a peaceably minded State which has had to put up with many injuries—breaches of treaty perhaps—hostile tariffs, insulting language—from the Government of State B.

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[30] So Professor De Visscher's argument in the *Revue de Droit International*, *ubi supra*.

[31] See M. Briand's speech in the Greco-Bulgarian Affair. Official Journal of the League of Nations, *ubi supra*.

It may be wholly in the right as to the matter in dispute. It may reasonably fear an attack from State B. But if it takes the law into its own hands and 'resorts to war' against State B, without first exhausting the procedure prescribed by the Covenant, it has broken the Covenant. It was bound to wait, if it proposed to observe the Covenant, until State B 'resorted to war' before it could set up a plea of self-defence as an excuse for a 'recourse to armed force.'

If a further justification is needed for the Council's definition of 'resort to war,' it is perhaps to be found in what may be called the common sense and common practice of mankind. The common sense of men recognizes the use of armed force as the main characteristic of war, even if it be agreed that there are cases of the use of armed force which are not cases of war. And the common practice of mankind, as we have seen already, is to treat the use of armed force as something which supplies a justification for a declaration of war from the suffering State; such a declaration having a retroactive effect so as to make the state of war relate back to the first use of armed force.[32]

It may, however, be objected that 'recourse to armed force' is not always a self-explanatory phrase, that in certain conditions a practical question may arise, by what action in an international dispute can a Power be properly said to have 'recourse to armed force.' On the one hand it is clear that a merely economic reprisal, even if not permissible by reason of an existing treaty, as for example the imposition of a general and prohibitive tariff on all imports from the opponent State, is not a 'recourse to armed force.' It does not involve the employment of the army, navy or air force of the State. On the other hand it is, it is submitted, clear that the seizure of a port by a naval force, however pacific in intention, is a 'recourse to armed force,' even if no gun is fired; but for the presence of the armed force, you could not do what you have done. If there is resistance, and guns are fired, whether with or without consequent loss of life or destruction of property, the case is clearer still. But there might be room for argument how far a recourse to armed force was involved if an embargo were laid on ships of the opposing Power in the harbour of its opponent, the force employed being that of the harbour police. It might even be contended (but not, I think, with success) that a Pacific Blockade where no shot was fired was not a 'recourse to armed force,' but merely a threat to use armed force, if occasion should arise.

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[32] See McNair, *ubi supra*, pp. 11 and 17.

Perhaps the best general test that can be suggested is that there is a recourse to armed force whenever the military, naval or air forces of the Government of one country are deliberately employed by order of that Government against another State; in such a case it is hardly open to doubt that if a declaration of war by either party to the dispute were to follow, a Court would hold that the state of war existed as from the date of the employment of the military, naval or air force.[33] But the test must be applied with common sense and not pedantically.

Conclusions.

It may be objected to these conclusions that they do not embody a 'scientific' view, that the science of international law has attached, or at any rate ought to attach, a definite meaning to the word 'war' and that this meaning must obtain in all international documents and especially in a document of such importance as the Covenant. You cannot, it will be said, have a 'resort to war' within the meaning of an international document unless 'war' in the full sense of international law results. It must however be remembered (1) that there is not complete agreement between writers of authority on this definite meaning and, so far as the writer is aware, there exists no binding definition of 'war' in any convention, treaty or other international instruments to which the States of the civilized world have set their hands; (2) that, when a science has for its subject-matter human relations which are under the control of those who are not adepts in the science, it would be unfortunate that the scientific terminology should adopt ordinary language, and use it with a special or esoteric sense for the interpretation of the utterances of non-scientific men. A divergence of scientific from ordinary speech is specially mischievous when the scientific terminology is not confined to the discussion of scientists, but has authority for the purpose of giving practical effect to language used by non-scientists in matters of human concern. Thus many a lay testator, making his own will without the assistance of a lawyer, has failed to give effective expression to his intentions as to the disposal of his property by using words such as 'heir,' 'issue,' 'money' which are interpreted by lawyers, in accordance with legal rules or on the

[33] There are other, quite distinct, retroactive effects of the outbreak of war, *e.g.* the invalidity of transfer of property made in anticipation of a declaration of war. (*The Sally* (1795) 3 C. Rob. 300 (n), and *The Southfield* (1915) 1 B. & C. 332, P. C.; approved in *The Daksa* (1917) 2 B. & C. 358, P. C.—cited by McNair, *ubi supra.*)

authority of precedents, in senses different from the usage of ordinary contemporary speech. President Wilson did not welcome, though he endured, the assistance of lawyers in the drafting of the Covenant and the Covenant preserves not a few traces of its lay origin. It would be deplorable if international Courts in interpreting the Covenant should allow themselves to arrive at conclusions which would lend countenance to the view that there is a serious difference between the meaning of the word 'war' when used by international lawyers and its meaning in the mouth of statesmen. The ideal treaty in these days is one which, to use Mr. Kellogg's language,[34] is 'so simple and unconditional that the people of all nations could understand it.' In such a document a specialized and almost esoteric sense of a common word is misplaced. 'War' in a treaty should mean what it means to ordinary people. Statesmen and lawyers should not call the same thing by different names. Dr. Benes calls a certain event[35] 'open warfare'; an eminent international lawyer more cautiously speaks of the same event as 'actual if not legal war,'[36] and therein implies a serious criticism of one possible view of 'law,' for it is not good that law should separate itself from fact.

But let it be repeated that these observations are not intended as a contribution to the solution of the problem of what is 'war,' as a general matter of international law, apart from the interpretation of the Covenant. And, equally, these observations are not intended as a contribution to the distinct question as to what action ought to be taken in any given case where a State has 'resorted to war.'

Appendix.

THE COVENANT OF THE LEAGUE OF NATIONS.

Preamble.

The High Contracting Parties,

In order to promote international co-operation and to achieve international peace and security

by the acceptance of obligations not to resort to war,

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[34] Speech of March 28, 1928, before the League for Political Education at New York. (Cited by Mr. Stimson in his speech of August 8, 1930, to the Council of Foreign Relations, New York.)

[35] Article in the American Journal *Foreign Affairs*, for October, 1932, p. 73.

[36] A. W. Dulles, *ibid.* p. 56.

by the prescription of open, just and honourable relations between nations,

by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and

by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another,

Agree to this Covenant of the League of Nations.

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ARTICLE 11.

(1) Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary-General shall on the request of any Member of the League forthwith summon a meeting of the Council.

(2) It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

ARTICLE 12.

(1) The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council, and *they agree in no case to resort to war* until three months after the award by the arbitrators or the report by the Council.

(2) In any case under this Article the award of the arbitrators shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

ARTICLE 13.

(1) The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration. . . .

(4) The Members of the League agree that they will carry out in full good faith any award that may be rendered, and that *they will not resort to war* against a Member of the League which complies therewith. In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto.

ARTICLE 14.

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. . . .

ARTICLE 15.

(1) If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. . . .

(3) The Council shall endeavour to effect a settlement of the dispute, and if such efforts are successful a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

(4) If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto. . . .

(6) If a report by the Council is unanimously agreed to by the members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that *they will not go to war with* any party to the dispute which complies with the recommendations of the report.

(7) If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice. . . .

(9) The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute, provided that such request be made within fourteen days after the submission of the dispute to the Council.

(10) In any case referred to the Assembly, all the provisions of this Article and of Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly, if concurred in by the Representatives of those Members of the League represented on the Council and of a majority of the other Members of the League, exclusive in each case of the Representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the members thereof other than the Representatives of one or more of the parties to the dispute.

ARTICLE 16.

(1) Should any Member of the League *resort to war* in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not. . . .

(4) Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

ARTICLE 17.

(1) In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council. . . .

(3) If a State so invited shall refuse to accept the obligations of membership in the League for the purposes of such dispute, and shall *resort to war* against a Member of the League, the provisions of Article 16 shall be applicable as against the State taking such action. . . .

ABUSE OF RIGHTS.

H. C. Gutteridge.

THE theory of the abuse of rights is one which has been rejected by our law, with the result that the ancient brocard '*dura lex sed lex*' finds its most vivid illustration in the present-day decisions of the Anglo-American Courts. The absolutist view of rights which is a feature of the Common Law was summed up by Lord Macnaghten in trenchant language when he said in *Mayor of Bradford* v. *Pickles*[1] that although Mr. Pickles's conduct in wilfully depriving his fellow townsmen of part of their water supply might be 'shocking to a moral philosopher' there was nothing in the law of England which could stop him from being as 'churlish, selfish and grasping' as it was possible for a man to be. In other words our law has not hesitated to place the seal of its approval upon a theory of the extent of individual rights which can only be described as the consecration of the spirit of unrestricted egoism.[2]

This is a conclusion which cannot be regarded with indifference by any good citizen, and it is somewhat strange that English text-book writers should apparently accept it with equanimity.[3] The possibility that a legal right may be exercised with impunity in a spirit of malevolence or selfishness is one of the unsatisfactory features of our law, and there would appear to be a *prima facie* case for reform in this direction, a

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[1] [1895] A. C. 587, at p. 600. The absolutist theory appears to predominate in American law, but in certain States there is legislation of a modifying character, *e.g.* as regards the erection of 'spite fences,' and the plea of justification in libel actions. See Ames in 18 Harvard L. R. p. 97, and 22 Harvard L. R. p. 411. The position in Canada, so far as the Common Law jurisdictions are concerned, is discussed by Robinette, 'Delictual Responsibility in the Common Law Provinces of Canada,' Canadian Bar Review, vol. xi, at p. 101.

[2] See also *per* Wills J. in *Allen* v. *Flood* [1898] A. C. 1, at p. 46: 'Any right given by contract may be exercised against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of the right. It is hardly too much to say that some of the most cruel things that come under the notice of a judge are mere exercises of a right given by contract.'

[3] See Pollock, *The Law of Torts* (12th ed.) at p. 23; Salmond, *The Law of Torts* (7th ed.) at p. 8. But cf. Goodhart, *Essays in Jurisprudence and the Common Law*, at p. 36; Winfield, 'Law Reform,' L. Q. R. vol. xliv, p. 290; Walton, 'Motive as an Element in Torts in the Common and in the Civil Law,' 22 Harvard L. R. p. 501.

belief which is strengthened by the fact that ours is the only modern system which has not endeavoured to evolve some means by which it may be ensured that a rule of law shall not be transformed into an instrument for the gratification of private spite or the promotion of chicanery. But the technical difficulties in the way of any change must not be ignored. An empirical system like our common law does not lend itself very readily to reconstruction, and there are certain features of our legal institutions, such as the trial of civil actions by juries, which are apt to work badly when it becomes a question of the extension of the area of civil responsibility. It is, therefore, necessary that great caution should be exercised before attempting to introduce into English law a principle such as that of the abuse of rights which is capable of general application. As Lord Atkin points out in *Donoghue's Case*,[4] 'acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief.' The problem now under discussion is a practical one, and it consists in weighing the respective advantages and drawbacks of a legal theory which, to a greater or lesser degree according to its formulation, is certain, if put into practice, to operate as a restraint on individual freedom of action.[5] There can be no better guide, in the circumstances, than the experience of foreign systems of law which have proceeded along the road in advance of us, for it is thus that we shall discover the obstacles and pitfalls which may lie in our path and learn whether it is possible to surmount them.

I propose, therefore, to attempt a discussion of this question from a comparative point of view. I venture to think that this may at least help us to see the theory of 'abuse of rights' in its proper perspective, and perhaps also to determine the extent to which it may be feasible and expedient to alter our existing law in order to do away with what, from an ethical point of view, is one of its defects. This method of approach to the subject will involve the consideration of three distinct topics. It will be necessary first of all to inquire whether there really is such a thing as an abuse of a right, or—to put the matter in another way—what is it that we mean when we say that a right has been abused? Our next step will be to investigate the attitude of English law towards the problem, and we shall then

[4] *Donoghue* v. *Stevenson* [1932] A. C. at p. 580.

[5] A Belgian jurist, for instance, supports the theory of the abuse of rights on the ground that it 'furnishes a means of transmuting individual into social rights without causing an upheaval.' (Campion, *La théorie de l'abus des droits*, p. 320.)

endeavour to attempt a general survey of the methods adopted by other jurisdictions in grappling with it. This will involve a brief study of the policy which has been followed elsewhere, ranging from the cautious attitude of French and German law to the more adventurous spirit displayed by the legislator in Switzerland and Soviet Russia.

(A) 'Abuse of Rights' as a Term of Art.

The employment of the term 'abuse' in this connexion is of doubtful elegance. For instance, Planiol[6] maintains that an act cannot be both lawful and unlawful at one and the same time; in other words, an act ceases to be the exercise of a right as soon as it acquires an abusive character. He therefore stigmatizes the use of the phrase 'abuse of rights' as a 'barren logomachy.' If it is to be postulated that the exercise of a right with the intention of harming another is wrongful, the inevitable conclusion seems to be that the act complained of must be tortious, and it is consequently superfluous to speak of it as the abuse of a right. But Josserand,[7] who is the protagonist of the 'relativity' school of thought, adheres to the word 'abuse' and defends it on a ground which is somewhat difficult to explain to an English lawyer. He relies on the distinction between the specialized rules of a legal system (*droits subjectifs*) and the general principles upon which those rules are founded (*droit objectif*). It may, he admits, be incorrect to speak of an abuse of a subjective right, but the exercise of such a right for an improper purpose must, in his view, nevertheless be an abuse in so far as it offends against objective law. He concludes, however, that the term 'abuse' is open to criticism and that he would prefer for this reason to speak of the 'distortion of rights' (*détournement des droits*), but he points out that the employment of the word 'abuse' is inveterate in the literature of French law and that it is convenient to use it as indicating the root idea of the theory of the relativity of rights. For reasons which will appear hereafter German lawyers do not make any extensive use of the phrase, but prefer to speak of 'chicanery' in this connexion (*Schikane*).[8] A leading institutional work on Italian law[9] refers to 'competitive rights' (*atti emulativi*),

[6] *Traité élémentaire de droit civil*, vol. ii, § 871. Cf. Ripert, *La règle morale dans les obligations civiles*, § 89; and Duguit, *Les transformations générales du droit privé*, p. 198.

[7] Josserand, *De l'esprit des droits et de leur relativité.*

[8] Enneccerus, however, speaks of 'misbräuchliche Rechtsausübungen': *Lehrbuch des Bürgerlichen Rechts*, § 220.

[9] Venzi, *Manuale di Diritto Civile Italiano* (5th ed.) p. 196. Cf. the Scots law as to acts done in '*aemulationem vicini*,' Erskine, Inst. II, 1, 2.

which are defined as acts which are lawful in themselves, but are exercised solely with the intention of harming others. This last definition is closely related to another label which has been invented to meet the situation, *i.e.* the 'conflict of rights,'[10] but the use of this term is clearly inadmissible since there may often be a collision in the sphere of individual rights from which elements of bad faith are totally absent, *e.g.* the case of a nuisance.

For our present purposes we may conveniently adopt the phrase 'abuse of rights' because it emphasizes the underlying conception that the law should prohibit the exercise of a right for a purpose which shocks the conscience of mankind in general.

(B) The Criterion of Abuse.

To speak of an abuse of a right without attempting to determine its nature is simply to indulge in a rhetorical flourish[11] which finds its only echo in an empty phrase. Some definite criterion is required which will enable us to fix the circumstances in which the purported exercise of a legal right will assume a wrongful aspect.

As will appear, when we reach the comparative stage of our investigations, the tests which can be applied, in any given state of facts, fall under two headings, namely, those which are of a subjective nature, and those which are objective in character.

The subjective test.—This is based on an intention to inflict harm, the *animus vicini nocendi*, which thus becomes the criterion of the abuse of a right. An act which is done with the sole or dominant purpose of harming one's neighbour becomes abusive and therefore wrongful, even though it may be cloaked with the outward trappings of a legal right. Such acts as the erection of a 'spite wall' or the vindictive use of the name or the portrait of some other person will thus be brought within the category of abuses. This is a solution which, at first sight, offers many attractions. The test is positive in the sense that it indicates the nature of the evil which we are seeking to repress. It is also definitive, because it gives us the lines of demarcation beyond which a right may not be exercised.

[10] Desserteaux, 'Abus de droit ou conflit de droit,' *Revue Trimestrielle de Droit Civil*, 1906, p. 116. Cf. Josserand, *op. cit.* at p. 337.

[11] It is not without interest to note that one of the reasons alleged by the Socialist Party in the French Chamber of Deputies in justification of the refusal to pay the current instalment of the War Debt to the U.S.A. was that it was an abuse of rights to demand payment in the circumstances. (*Times* Newspaper, December 28, 1932.)

Spiteful conduct represents a type of act which no one would seek to excuse on moral grounds, so that the subjective test escapes the assaults of uninstructed criticism. From the lawyer's point of view it has the merit of confining the scope of a rule against abuse within limits which prevent its employment for ulterior purposes by the sociologist and the politician.

On the other hand, it is open to many objections. It involves an investigation of a psychological order into the question of motive and the introduction into the matter of an ethical element, both of which are considerations which tend to impede the effective operation of a legal rule. If any illustration of the restrictive influence of these factors is required, it will be sufficient to refer to the English law of misrepresentation and to mention the failure of the common law action of deceit to provide an adequate remedy for the malpractices of persons responsible for the issue of prospectuses, which resulted in the intervention of Parliament.[12] The truth of the matter is that when we say that an act is prompted by an intention to harm we are dealing with something so impalpable and evasive that this criterion is usually of restricted value in practice. A man rarely acts with a single motive; in the majority of cases his intentions are mixed, and it often becomes impossible to disentangle from the complex of motives the one which is to be regarded as the sole or even the dominant impulse of his conduct. This has proved to be such a serious drawback that the purely subjective test has, in effect, been abandoned by all systems of law, even by those which have begun their approach to the problem by its adoption.[13]

The objective test of intention to harm.—The breaking down in practice of intention as a subjective test compels us to go further afield in the search for a suitable criterion of an objective nature. This may be found in its simplest and least adventurous form in the adoption of the test of 'objective intention.' The attempt to 'try the thought of man' is not wholly abandoned, but the existence of an '*animus vicini nocendi*' is deduced from the circumstances generally (including the motives influencing the act, so far as they are ascertainable), and more particularly from the consequences of the act, as, for instance, where it is unnecessary or causes excessive damage. This expedient gets rid of the difficulties of an evidentiary nature which have just been mentioned, but the test is still defective in

[12] Directors Liability Act, 1890, and see now the Companies Act, 1929, s. 37.
[13] See *post.*

so far as it lacks the element of precision which is essential in the case of a criterion which has to be applied to somewhat delicate states of fact. It is probably for this reason that all reference to 'intention' tends to disappear from the formula, and is replaced in French law by a reference to 'legitimate motive.'

It is argued that certain rights are not absolute in character, but must only be utilized in pursuance of a 'legitimate motive,' *i.e.* for the purpose for which they would be exercised by a hypothetical reasonable and honest man in the particular circumstances of any given case. The word 'legitimate,' no doubt, begs the question,[14] but if it is understood in the above sense, we are furnished with a test which ceases to be wholly subjective. If an objective criterion is aimed at, it would seem, however, to be more logical to abandon the use of a specious phrase such as 'legitimate motive' and to adopt as a test of abuse either the 'unreasonable'[15] or excessive nature of the exercise of a right or, as Ames has suggested, the infliction of harm without just cause.[16]

The theory of the relativity of rights.—It is not surprising that the concept of abuse should make a strong appeal to the sociological school of legal thought which has found its chief exponent, in this connexion, in Professor Josserand, the Dean of the Faculty of Law in the University of Lyons. His contributions to legal science have not received the attention in England which they merit, but he is beyond doubt one of the most original and provocative of the modern writers on French law. In his brilliant treatise on the relativity of rights[17] he advances the view that the exercise of a right must be governed by its conformity to the social purpose of the rule of law which creates the right. Law is brought into being for the benefit of the community and not for the advantage of the individual. M. Josserand cites with approval the statement of Duguit[18] that man, as an isolated being, cannot have any rights so that

[14] The criterion of legitimate interest appears to have first been suggested by Brethe (*Sirey*, 1925, 2, 217). See the criticism of this test by Ripert, 'Abus ou Rélativité des Droits,' *Revue Critique de Legislation*, 1929, p. 11.

[15] Continental lawyers have a prejudice against the criterion of 'reasonable' conduct based, so it would seem, on the fact that it involves an arbitrary element, which must be left to the discretion of the judges. But the inconsistency of this attitude is illustrated, for instance, by the fact that, whilst German law strains at the gnat of reasonableness, it nevertheless swallows the camel in the shape of a concept such as that of *boni mores*, which is even more dependent on the workings of the judicial mind.

[16] 22 Harvard L. R. at p. 412.

[17] *De l'esprit des droits et de leur rélativité.*

[18] *Traité de Droit Constitutionnel*, vol. i, p. 266.

it is only as a member of an organized community that it is possible for him to acquire a legal personality. The extent of the exercise of a right must, therefore, be fixed, not by reference to the benefit which is conferred on the individual, but in its relation to the social complex as a whole. Gény expresses very much the same idea when he says that it is necessary to weigh individual interests in the scales of justice, and to secure the preponderance of those which are the most important when judged by the criterion of the interests of society.[19]

The theory of the relativity of rights in the form in which it is propounded by M. Josserand has not found general acceptance.[20] The criterion of 'social purpose' is open to the objection that if it is unqualified it would tend to sterilize human activities, because 'life could not go on if we did not, as the price of our own free action, abide some measure of inconvenience from the equal freedom of our neighbours.'[21] But M. Josserand does in fact qualify the theory of the relativity of rights and he does it in this way. He divides rights into three groups: (a) 'absolute,' (b) 'egoistic' and (c) 'altruistic' rights.[22]

An 'absolute' right is one which has been created by the lawgiver for the express purpose of its uncontrolled exercise by the beneficiary of the right. It is conferred on the individual in this form, says M. Josserand, because the interests of society demand that there shall be no check on its exercise; in other words its absolute character is connected with the welfare of the community, and not with the advantage of the individual. The spirit or essence of the law (*esprit*) requires in such case that the exercise of the right shall be unfettered, and, so long as there is a purported exercise of such a right, the question of abuse cannot arise. Instances of a right of this description are the right of a person to decide whether he will enter into a contract or not, and the right of a testator to dispose of his property by will as he pleases.

'Egoistic' rights are those which can be exercised at the will of the beneficiary provided that he is promoting some

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[19] *Méthode d'Interpretation* (2nd ed.) vol. ii, § 173.

[20] See Planiol, *op. cit.* vol. ii, § 871; Colin-Capitant, *Cours Élementaire de Droit Civil*, vol. ii, § 195; Ripert, *La règle morale dans les obligations civiles*; Capitant, 'Sur l'abus des droits,' *Revue Trimestrielle de Droit Civil*, 1928, p. 365.

[21] Pollock, *op. cit.* at p. 150.

[22] Josserand, *op. cit.* pp. 387 *et seq.* The French text refers to droits (1) *Non Causés*, (2) *Égoistes*, (3) *Altruistes*. *Non causé* is a phrase which it is impossible to translate: its nearest meaning is perhaps 'absolute' or 'unconditional.' Cf. the classification of rights by Wills J. in *Allen* v. *Flood* [1898] A. C. at p. 46.

material interest which he possesses in the doing of the act. The law decrees in certain cases that a person shall be entitled to act in a selfish spirit, because it is in the interests of the community that he should do so. Such, for instance, is the spirit or essence of a rule of law which sanctions freedom of competition in commerce, or which permits the owner of land to excavate the subsoil. An act done in pursuance of a right of this description will not be abusive unless it is established that the motive with which it is done bears no relation to any material interest of the person doing the act.

'Altruistic' rights are those which are not brought into being for the advantage of the beneficiary of the right, but exist solely for the welfare of the community. An altruistic right cannot, therefore, be exercised in a spirit of egoism, but only with due regard to the interests of others. If such a right is diverted so as to serve some selfish interest of the individual on whom it is conferred there is an abuse. M. Josserand is somewhat vague as to the precise nature of these altruistic rights, but he cites the case of guardianship. A guardian has the right to control over his ward, but this is a right which he must not exercise for his own benefit. This is obviously open to the criticism that the law, in such a case, creates a power rather than a right. The right of fair comment would, however, appear to come under this heading.

It has been necessary to detail these classifications because although M. Josserand's views are not generally accepted by continental lawyers, there seems to be some ground for thinking that the criterion which he proposes, namely, that of the 'spirit of the law,' has not been without its influence, *e.g.* in the case of the Franco-Italian draft code of obligations.[23] It has been welcomed, moreover, as a means of 'socializing' the law by the restriction of competition between individuals, and it cannot be regarded as having spent its force. A similar concept of the nature of an abuse of rights is to be found, as we shall see hereafter, in the Soviet Code.[24]

I must apologize if up to this point I have appeared to breathe jurisprudence at the reader, but I have thought it necessary to consider the theory of abuse in the abstract because it would otherwise become difficult to appreciate the nature of the different solutions of the problem which are to be found in the law of continental Europe.

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23 Franco-Italian draft code of Obligations, Art. 74.
24 *Post*, p. 41.

(C) The Attitude of the Common Law towards Abuses of Rights.

As I am addressing myself to English lawyers it does not seem to be necessary to elaborate this aspect of the question, though it is a little difficult to resist the temptation to probe into the matter more deeply with a view to ascertaining the precise extent to which an individual can, in England, escape responsibility for the infliction of harm by sheltering himself behind the plea of legality. But it is clear that the theories of abuse and of relativity of rights, in general, have no place in our law as it now stands.[25] Even the Courts of Equity in the past, acting on the maxim that 'Equity follows the Law,' applied a common law rule, however harsh it might be, where the legal analogy was not in question.[26] It would, however, be an exaggeration to say that the notion of an abuse of right is entirely excluded from the ambit of our legal institutions. The legislator in England has, for instance, intervened more effectively than elsewhere to check the abusive institution of proceedings in a civil Court.[27] The rights of money-lenders have been curbed with severity,[28] and the right of an employer to dictate the terms on which persons may enter his service has also been curtailed in certain cases of public employment.[29] The power of carriers by land and sea to contract out of liability for negligence has also been checked by legislation.[30] Landlords of certain premises have lost the unrestricted right of refusing the renewal of a lease.[31] The common law rules relating to nuisances extend over much of the same ground as that which is covered by the continental theories of abuse. But these are isolated instances of the recognition of the proposition that a legal right may be abused. The law of England has refused to give its imprimatur to the theory as a general principle: it merely asks 'what the defendant has done and not

[25] *Mayor of Bradford* v. *Pickles* [1895] A. C. 587; *Allen* v. *Flood* [1898] A. C. 1. A curious but isolated instance of the recognition of the principle of abuse is to be found in *Christie* v. *Davey* [1893] 1 Ch. 316, where the making of musical or other noises was restrained on the ground that although it was too unsubstantial to amount to a nuisance it constituted a malicious attack on the comfort of another person. This case must be treated as of doubtful authority, though it can perhaps be justified on other grounds. See the remarks of Dr. Stallybrass on this case in Salmond, *op. cit.* at p. 263, note (*d*).

[26] This statement is subject to certain exceptions, *e.g.*, the creation of the separate estate of a married woman.

[27] Judicature Act, 1925, s. 51.

[28] Moneylenders Acts, 1911—1927.

[29] Trade Disputes and Trade Unions Act, 1927, s. 6.

[30] Railways and Canal Traffic Act, 1854, s. 7; Carriers Act, 1830, s. 1; Carriage of Goods by Sea Act, 1924, Art. III, r. 8.

[31] Landlord and Tenant Act, 1927, s. 5.

why he did it.'[32] I am allowed to dig a well on my land and deprive my neighbour of his water supply out of pure malevolence. So long as I steer clear of fraud or defamation in the technical sense I can utilize my neighbour's name or his portrait in a thoroughly offensive manner for the purpose of gratifying some grudge which I may have against him.[33] As Lord Watson said in *Allen* v. *Flood*,[34] 'the existence of a bad motive, in the case of an act which is not itself illegal, will not convert that act into a civil wrong for which reparation is due.' Cases of privilege, *e.g.* the defence of 'reasonable and probable cause' in the action of malicious prosecution and the defence of fair comment are no exceptions to this rule, because the act complained of is in these instances wrongful *ab initio* though its perpetration is excused from considerations of public policy.

It would seem, therefore, that there is a kind of hinterland to our law of torts where the King's writ does not run—a veritable legal Alsatia—in which greed, envy and spitefulness are permitted to reign supreme. Public policy may perhaps require that it shall remain inviolate, but this is a matter which I will discuss hereafter.

(D) French Law and the Abuse of Rights.[35]

In the case of the civil law jurisdictions one harks back almost automatically to Roman law for the origins of a legal concept. It would seem that some of the Roman jurists may have recognized the possibility that a right might be abused. We have, for instance, the statement of Marcellus[36] that a person inter-

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[32] Salmond, *op. cit.* p. 18.

[33] *Burgess* v. *Burgess* (1853) 22 L. J. Ch. 675. See generally, Winfield, 'Privacy,' L. Q. R. vol. xlvii, p. 23.

[34] [1898] A. C. at p. 92. Motive is perhaps material in cases of civil conspiracy. See *per* Lord Dunedin in *Sorrell* v. *Smith* [1925] A. C. pp. 724—726, and cf. *per* Lord Sumner, *ibid.* at p. 742; see also Winfield, 'The Province of the Law of Tort,' p. 34.

[35] Limits of space forbid a general survey of continental law. The Belgian judges have rejected the theory of abuse in its more advanced stages. Dabin, *La Vie Juridique des Peuples* (*Belgique*), at p. 165. But see Campion, *La théorie de l'abus des droits.* Legal opinion in Italy appears to be divided: see Venzi, *op. cit.* p. 197, and Mario Rotondi, 'L'abuso di diritto,' *Rivista di diritto Civile*, 1923, p. 24. The German, Austrian, Swiss and Soviet rules against abuse all call for special treatment and are discussed later. The Turkish law is the same as the Swiss law. The Swedish law of 1915 dealing with abusive unilateral rescission of a contract is of considerable interest, but there is no general legislation against abuse in the Scandinavian countries. Art. 90 of the Japanese Civil Code forbids acts contrary to 'morality.' The Chinese Code (Art. 148) prohibits the exercise of a right with the dominant motive of harming some other person.

[36] D. 39. 1. 12 (*de acqua*) referred to by counsel *arguendo* in *Mayor of Bradford* v. *Pickles* [1895] A. C. 587, at p. 590. Also by Tindal C.J. in *Acton* v.

cepting underground water would be liable if he acted '*animo vicini nocendi.*'[37] This does not mean that Roman law possessed a general theory of the abuse of rights because it was in essence absolutist.[38]

Marcellus and Labeo cannot be regarded, however, as having inspired the framers of the Code Napoleon, and down to the middle of the nineteenth century modern French law was under the sway of the absolutist theory of rights. The concept of abuse has been introduced since then, partly by *doctrine* or the views of legal writers, and partly by *jurisprudence* or the decisions of the French Courts. The extent to which it has permeated the French law of obligations must be regarded as a matter of controversy. All that can be said with any confidence is that the theory of abuse has been received, and finds application in practice to a somewhat uncertain degree. French law differs from ours in this respect that an isolated decision can be disregarded, and it is only when a principle has been laid down repeatedly by the Courts that it can be treated as established. So far as abuse of rights is concerned there is a mass of precedents, a *jurisprudence constante*,[39] which shows that the theory is recognized, but the *ratio decidendi*—as we should term it—of the decisions is not always the same. The French Courts have shrunk from the task of definition. Sometimes they adopt intention to harm as the criterion; at others we find a reference to the social purpose of a rule of law; but the test which is applied most generally is that of legitimate motive which, as I have endeavoured to show, means intention to harm, ascertained objectively, *i.e.* the inquiry is whether the defendant in the action has exercised a right in a prudent and reasonable manner or not.

This is hardly the place for an exhaustive examination of the French precedents: indeed it would perhaps be an impertinence for an English lawyer to attempt it, but the operation of the theory of abuse in practice may be illustrated by reference to three of the leading French cases.

Chronologically the first of these is a decision of the Court

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Blundell (1843) 12 M. & W. 324, at p. 353, and by Lord Wensleydale in *Chasemore* v. *Richards* (1859) 7 H. L. C. 349, at p. 387.

[37] Reference is often made to the maxim '*Neque malitiis est indulgendum*' D. 6. 1. 38 (*de rei vindicatione*). See generally on this question Cornil, *Le Droit privé*, p. 102; *Mélanges Cornil*, p. 68; Pringsheim, '*Animus in Roman Law*,' L. Q. R. vol. xlix, at p. 52.

[38] '*Nullus videtur dolo facere qui suo iure utitur*' (D. 50. 17. 55).

[39] These are summarized in Planiol, *op cit.* vol. ii, § 872, and Colin-Capitant, *op. cit.* vol. ii, § 198. See also Walton, 'Delictual Responsibility in Civil Law,' L. Q. R. vol. xlix, at pp. 87, 92.

of Appeal of Colmar given in the year 1855.[40] The owner of a house erected a tall dummy chimney on his roof for the sole purpose of annoying a neighbouring householder by depriving him of the access of light to certain of his rooms. Art. 552 of the Code Civil states that the owner of land can plant or build on it whatever he thinks proper, subject only to certain exceptions which are irrelevant for our present purpose. It was argued that the defendant was merely doing what he had an absolute right to do, and that the motive of his act must be disregarded, but it was held by the Court that this was no answer to the claim. Although the defendant was exercising a right given to him by the law he was acting with spiteful intent, and had no serious and legitimate interest in what he was doing. His act must, therefore, be treated as wrongful.

A year later a decision to the same effect was given by the Court of Appeal of Lyons,[41] only in this case the question turned not on the erection of a structure, but on the excavation of the subsoil, the circumstances being much the same as those in *Mayor of Bradford* v. *Pickles*.[42] There was a number of adjacent springs yielding the famous St. Galmier mineral water, and the proprietor of one of the springs installed a powerful pump, with the result that the yield of an adjoining spring belonging to another owner was diminished by two-thirds. There does not seem to have been any direct evidence of spite in this case, but it was inferred that the owner of the pump was inspired solely by a desire to inflict harm, because he merely wasted the additional supply of water which he had obtained in this way. Reliance was placed by the defendant on Art. 544 of the Code Civil which states that 'ownership is the right of enjoying and disposing of a thing in the most unlimited manner provided that it is not utilized in a manner forbidden by law.' It was decided in terms that where an act is done with the sole and deliberate intention of inflicting harm it is wrongful and cannot be justified by pleading a proprietary right.

The third case which is of a curious and interesting description was decided many years later by the Court of Cassation.[43] It is the most famous of all the decisions which have been given on this question and it is one of the few French cases which is referred to by name, *i.e.* as the '*affaire Clément-Bayard*.' The

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[40] *Dalloz Périodique*, 1856. 2. 9.

[41] *Dalloz Périodique*, 1856. 2. 199. Cf. a decision to the same effect by the Court of Cassation, Reg. 10 June, 1902, *Sirey*, 1903. 1. 11.

[42] [1895] A. C. 587.

[43] Trib. Civ. Compiégne, *Dalloz Périodique*, 1913. 2. 177; Amiens et Req. *Dalloz Périodique*, 1917. 1. 79.

Clément-Bayard Company were the owners of certain hangars in which they housed airships which were being built to the order of the French Government. Friction arose between the company and the owner of the adjoining site, who was piqued by the failure of negotiations for the purchase by the company of his land at a high valuation. He erected within his own boundaries a number of wooden scaffolds of a considerable height fitted with projections bristling with spikes. The intention was, of course, to bring pressure to bear on the company by making it impossible or difficult to launch the airships, and in fact on one occasion an airship collided with one of these structures and was severely damaged. In an action brought by the Clément-Bayard Company for damages and an order for the removal of the obstructions, it was pleaded by the defendant that he was merely exercising a right given to him by the provisions of the Code Civil which have just been cited. It was held successively by the Civil Tribune of Compiègne, the Court of Appeal of Amiens and the Court of Cassation that the defendant was liable. The case is important because the defendant was in a sense animated by more than one motive. His primary intention seems to have been to force the Clément-Bayard Company to buy him out, but he also intended, if necessary, to wreck their airships for this purpose. It was held that the dominant motive must be taken to have been the infliction of harm, since the circumstances showed that the defendant hoped to secure his ends by the threat of injury to the airships of the plaintiff company. He could not, therefore, be permitted to shelter himself behind the plea that, whereas one of his motives was the deliberate infliction of harm, the other was not.

It seems to be beyond doubt that the French Courts will invariably repress any spiteful exercise of a proprietary right. But the principle of abusè has also been extended so as to cover a much wider area. It is impossible to deal with such instances in detail, but a few typical cases may be mentioned.[44] Thus it has been held to be abusive for an employer to refuse to employ trade unionists where his motive is to damage the trade union,[45] and likewise for a trade union to blacklist an employer from a vindictive motive.[46] Dramatic criticism of an unfavourable character is abusive if it is prompted solely by a desire to harm the author of a play.[47] The malicious institution of legal

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[44] See Walton (22 Harvard L. R. 501) for further illustrations.
[45] *Dalloz Périodique*, 1916. 1. 25.
[46] *Sirey*, 1905. 2. 17.
[47] *Dalloz Périodique*, 1924. 1. 97.

proceedings also comes under this heading[48]; in fact an English lawyer will find that many matters which we regard as separate wrongs have been swept up by the French Courts into the net of the abuse of rights. Planiol attributes this to the popularity of the word 'abuse' (*'l'expression a fait fortune'*) and he holds the opinion, which is supported by other writers, that the concept has been exaggerated and overworked.

With the exception of M. Josserand the leading '*civilistes*' are, in fact, somewhat coldly disposed towards the theory of abuse, and the general tendency of *doctrine* is against any further expansion of its ambit. The view most widely held appears to be that put forward by M. Capitant[49] amongst others, namely, that all that is meant by the theory of abuse is that a man must regard a right which has been conferred on him as carrying with it a duty to refrain from doing any harm to others which can be avoided. Certain rights cannot be exercised without injuring others and in such cases there can be no question of abuse, but where a right is not absolute in this sense the person exercising it is liable for any infliction of harm which could have been prevented. In substance this criterion contemplates an excessive rather than an abusive exercise of a right.[50]

The French case law on the question is very confusing to an English lawyer who is accustomed to the notion of *stare decisis*. It would seem that many of the decisions could be justified on grounds other than the theory of abuse, because the French law of civil wrongs is based on a general duty to refrain from doing harm, and a great many of them can hardly be regarded as precedents which will be followed in the future.[51] Perhaps the best illustration of the present attitude of French lawyers towards the theory of abuse is contained in the proposals of Art. 71 of the Franco-Italian draft Code of Obligations: '*Any person shall make compensation if he causes harm to another by exercising a right in excess of the limits fixed by good faith or by the object for which the right was conferred on him.*' This formula is no doubt vague, and it seems to be a compromise between the rival criteria of the intentional infliction of harm and the anti-social character of the exercise of a right. But it sums up the vacillation and nebulosity which appear to be salient features of the French law of the abuse of rights.

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[48] Planiol, *op. cit.* vol. ii, § 872.

[49] Colin-Capitant, *op. cit.* vol. ii, § 195.

[50] This distinction is perhaps somewhat subtle, but it exists nevertheless. An interesting parallel is furnished by the rule of French administrative law which renders an official liable for '*excés de pouvoirs.*' This is, however, a matter which cannot be pursued here. See Campion, *op. cit.* Chapter VIII.

[51] See Planiol, *op. cit.* vol. ii, § 872.

(E) The German Law relating to Abuses of Rights.

The position occupied in German law by the theory of abuse is somewhat complicated, but it may perhaps be summed up briefly in this way.

Judicial decisions have played a subsidiary part in the development of German law relating to the matter; the influences at work are clothed almost entirely in statutory garb. There is only one article of the German Civil Code (Art. 226) which deals expressly with abuse as a matter of principle, but there are certain others which relate to special cases of abuse.[52] Finally, there are other provisions of the Code which do not refer to abuses as such, but cover a considerable portion of the same area. The exploitation of a legal right with a malevolent intent will generally fall under the ban of one or other of these sections of the Code, and it may be assumed that any such conduct will as a rule be checked by virtue of some relevant provision of German law.

Art. 226 (the famous '*Schikaneverbot*') runs as follows: '*The exercise of a right is forbidden if it can have no other purpose than to harm some other person.*' This may seem to an English lawyer to be *brutum fulmen*, but its object is clear when it is remembered that in German law the doing of an act which is forbidden by a *Schutzgesetz*, *i.e.* a law enacted for the protection of personal interests, is always a tort.[53] The history of the *Schikaneverbot* is important.[54] The preliminary drafts of the Code restricted the application of the prohibition to the case of abuses of proprietary rights, but this was expanded by the Committee of the Reichstag into a general rule covering all instances of abuse whether they arose out of the exercise of rights of ownership or otherwise. The original limitation was due to the anxiety which had been expressed lest a general rule might lead to an undue interference with individual rights, and it is interesting to observe that these fears have not been realized.[55] A close examination of the words employed in Art. 226 shows that its operation is limited to cases in which it is possible to establish that a right has been exercised *solely*

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[52] These special cases deal mainly with the exercise of proprietary rights or with the right of a husband to administer his wife's property. It is not considered necessary to enumerate them here, but they are summarized in the institutional and encyclopaedic works on German Civil Law. See, for instance, Stammler, *Das Gesamte Deutsche Recht*, vol. i, p. 690.

[53] B. G. B. (Bürgerliches Gesetzbuch), Art. 823, para. 2.

[54] For a detailed narrative see the notes to Art. 226 in Staudinger's Commentary on the B. G. B.

[55] Enneccerus, Kipp and Wolf, *op. cit.* vol. i, § 220, note 4.

for the purpose of harming some other person. As I have already pointed out, this is a matter which it is extremely difficult to prove in a great many cases. The German Courts have realized this, and they have accordingly adopted an objective test of intention by which an *animus vicini nocendi* can be inferred from the circumstances.[56] Even so the difficulties of proof are often such as to render Art. 226 inoperative.[57] But it has been found to be useful in the case of the spiteful exercise of proprietary rights, and the experience of German lawyers is that it has not been accompanied by any undesirable restrictions on the liberties of individuals.[58] It is questionable whether it has had much effect in cases which do not involve the exercise of rights of ownership, because where it is a question, for instance, of rights given by contract, other and better remedies are provided by German law which do not involve the investigation of the state of mind of the person doing the act. Such cases will be dealt with presently, but in the meantime it may be remarked that German case law does not furnish very much help in elucidating the effect of the *Schikaneverbot*, though some of the decisions are of interest. Thus it has been held to be abusive for a father to refuse, for purely personal reasons, to to allow his son to visit his mother's tomb, situated on land belonging to the father.[59] It is clear, however, that the tendency is to place a strict interpretation on the provisions of Art. 226, and that the role which it plays in checking abuses of legal rights is correspondingly restricted.

The German law of civil wrongs does not recognize any general duty to refrain from inflicting harm on others, but it is much more supple and adaptable in this respect than our law of torts. This is due to the operation of two of the articles of the Civil Code (Arts. 138 and 826) which have as their object the repression of acts which are against *Sittlichkeit* ('*boni mores*'). It is impossible to translate this term into English; but broadly speaking an act is held by the German Courts to be '*contra bonos mores*' if it offends against the moral sense of

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[56] These include the motive with which an act is done, so far as ascertainable: *Reichsgerichts Entscheidungen in Zivil Sachen* (hereinafter referred to as R. G. E.) vol. lxviii, p. 425.

[57] It may be observed that this is perhaps due, to some extent, to the fact that the parties to an action do not, normally, give evidence in Germany, and are not cross-examined.

[58] Schuster, *German Civil Law*, p. 68; Enneccerus, Kipp and Wolf, *loc. cit.*

[59] Stammler, *op. cit.* p. 691. Art. 226 has also been employed as a check to prevent the rejection of goods by a buyer for some trivial fault. R. G. E. vol. lxi, pp. 91 and 95, and cf. *Jackson* v. *Rotax Motor Co.* [1910] 2 K. B. 937. It is also available as a remedy against the malicious institution of legal proceedings. R. G. E. vol. lxviii, p. 124.

the German people, judged, so it would seem, by a pre-war standard.[60] The nearest approach to this concept in the Anglo-American system is that of 'conscience,' but a German judge does not speak of *Sittlichkeit* with his tongue in his cheek as may sometimes happen when an English judge refers to Equity. When an Englishman says that such and such an act is not 'cricket' he means very much the same kind of thing as would be described as *unsittlich* by a German if allowances are made for differences in the national point of view. The standard of *boni mores* must obviously vary from tribunal to tribunal, but it is a real and potent force in the development of German law, and it has conferred praetorian powers on the German judges. So far as the theory of abuse is concerned it is difficult to conceive of any case in which the malevolent exercise of a right could not be checked by the application of the principle of *boni mores*. Mr. Pickles and the ingenious individual who erected the *chevaux de frise* in the Clément-Bayard case would have met with a short shrift at the hands of the German judges. What the relativists would term an absolute right is not touched by this concept, nor on the other hand is the exercise of an egoistic right provided that it is not influenced by some improper motive. The concept of '*Sittlichkeit*' avoids the extravagances of the theories of the sociological school of jurists. It is also free from the limitations imposed on the *Schikaneverbot* because it is not necessary to prove that the sole motive for the exercise of a right was an intention to harm: the test is objective and it will be enough if the act in question is one which the average decent German citizen would regard as unconscientious. It is small wonder that the existence of this extraordinarily plastic instrument in the hands of the German judges has resulted in the *Schikaneverbot* being pushed into the background.

Mention must also be made of another concept of German law which plays its part in curbing the abuse of legal rights. Where the enforcement of a business contract is in question the Civil Code by virtue of Arts. 157 and 242 requires that the parties shall act in accordance with *Treu und Glauben*. This again is a term which defies accurate translation, but it means that the parties must act in accordance with good faith as understood by men of affairs. In such cases as commercial sales, for instance, this is a principle which may often be invoked to restrain an abusive exercise of a contractual right.

If all else fails a German defendant who is menaced by the

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[60] Stammler, *loc. cit.*

spectre of chicanery can always fall back on the *exceptio doli generalis* of Romano-Germanic Common Law, which will enable him to plead that the plaintiff is not genuinely seeking to protect his rights, but is inspired by a dishonest motive in bringing his action.[61] This, however, is a defence which is rarely, if ever, resorted to; in fact it is not necessary to rely on it in view of the far-reaching effects of the provisions which have just been mentioned.

German law is well equipped with measures for the foiling of legalistic brigandage and it is not surprising, therefore, that the German text-books should devote so little space to the question of abuse of rights. The situation is, in fact, free from most of the uncertainties which characterize the French law relating to the matter.[62]

(F) The Swiss Law of the Abuse of Rights.

The Swiss law deals with abuses of rights on a different principle from that adopted in French and German law. Art. 2 of the Civil Code provides that '*every person is bound to exercise his rights and to fulfil his obligations according to the principles of good faith. The law does not protect the manifest abuse of a right.*' It will be observed that nothing is said about intention to harm one's neighbour; the Code goes straight to the point and condemns an abuse of rights in so many words without defining the phrase in any way. Thus it becomes the duty of the Swiss judges to decide whether a given state of facts constitutes the abusive exercise of a right or not, and no test is laid down which they are to apply for this purpose.

This is one of the instances of the policy adopted by the framers of the Swiss Codes in abandoning certain questions entirely to the judges. Art. 4 of the Civil Code states that where the law expressly leaves a question to the discretion of a judge he must base his decision on principles of justice and equity, a provision which is supplementary to Art. 1 of the Code which directs the judge to apply the spirit as well as the letter of the law. 'Justice and Equity' are words which are necessarily

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[61] For a discussion of the characteristics of the '*exceptio doli generalis*,' see Enneccerus, Kipp and Wolf, *op. cit.* vol. i, § 208, iii, 2.

[62] Austrian law has stopped short of the point reached by the law of Germany. The Civil Code of 1811 enacted by Art. 1305 that 'a person shall not be responsible for any damage he may cause when exercising a right given to him by law.' This rule was modified by a law of 1916 which amended Art. 1275 of the Code by rendering a person responsible who exercises a right *contra bonos mores*, if he does so with the manifest intention of injuring some other person. This means, of course, that there is no remedy against abuse unless there is proof of *animus vicini nocendi*.

vague, but when used in a Code they must mean something different from '*vulgaris aequitas*,' something more developed than justice in the popular sense, and in this context the reference must be to the kind of justice which a judge has learnt from his study of the law and his experience in its application to concrete facts.[63] But in any event the result is to make the judge the master of the situation, and the selection of a criterion of abuse rests entirely in his hands. He can declare the exercise of a right to be abusive because it inflicts harm in a purposeless manner, or involves some sharp practice, whether there be an intent to harm or not.[64] The difference between unconditional and other rights disappears altogether, and there is no right which is not susceptible of abuse in the eye of the Swiss law. It is not surprising that the latitude allowed to the Courts in this respect should have met with much criticism. In the first draft of the Code the remedy was limited to instances of the abuse of patrimonial rights, but it was extended to all descriptions of rights by the Federal Council. The rule appears to have given satisfaction in practice, but this is no doubt due to the great caution which the Swiss judges have displayed in making use of the amazingly wide powers which have been conferred on them by the Code. It is also due to the fact that the concluding sentence of Art. 2 which refers to abuse is regarded as being in reality only an illustration of the first sentence which requires an individual to exercise his rights in good faith. In this way the criterion of good faith has come to dominate the situation, and if the decisions of the Federal Tribunal are examined it will be found that *bona fides* is the paramount consideration [65] in the minds of the judges, and that the criterion adopted is, as a rule, to ascertain whether the conduct complained of is honest or not. The decisions are not always easy to reconcile, but the tendency is to construe Art. 2 in such a way that the effect of other provisions of the Code is not curtailed, and that new rights and duties are not created by the application of the rule.[66]

An examination of the Swiss Law Reports seems to indicate that Art. 2 is not relied on extensively, but is chiefly invoked

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[63] See this question discussed by Allen, *Law in the Making*, Ch. V, and cf. Williams, *The Sources of the Law in the Swiss Civil Code*, Ch. III.

[64] Rossel et Mentha, *Manuel de droit civil Suisse*, vol. i, p. 67; Egger, *Kommentar zum Schweizerischen Zivil Gesetzbuch*, vol. i, p. 73.

[65] Egger, *op. cit.* p. 73. It should be noted that the abuse must be manifest.

[66] See the following decisions of the Federal Court: *Bundesgerichts Entscheidungen*, vol. xl, III, p. 160; *Die Praxis des Bundesgerichts*, vol. iii, p. 190; vol. ix, 149, and more particularly the case of *Eberle* v. *Hämmerli*, *ibid.* vol. vi, p. 142, which appears to be regarded as the leading case.

in aid in cases where a defendant is technically liable in an action but the plaintiff is suing on unmeritorious grounds.[67] The reason for this is twofold. In the first place it is provided by Arts. 679 and 684 of the Civil Code that the owner of property must exercise his rights with due regard to the rights of adjoining owners. Secondly, the Swiss law has borrowed from the German Civil Code the concepts of acts *contra bonos mores*.[68] Finally, the notion that a right must only be exercised in good faith runs all through the Swiss Codes,[69] and it is only in cases of a somewhat special character that it becomes necessary to fall back on to the general provisions of Art. 2 of the Civil Code. It may be added that the Swiss judges are showing a marked reluctance to put any wider construction than is necessary on the wording of the Code, and are much influenced by the views of French and German commentators. The general result is that Swiss law is much more highly developed in theory than in practice.[70]

(G) The Provisions of the Soviet Code.

The provisions of the Soviet Code which can be regarded as relevant to the present question, represent the apex of the development of the theory of relativity. The interests of individuals no longer enter into the matter in any way and the sole considerations are the economic and social interests of the community. The exercise of a right is thus entirely subordinated to the needs of the State.

The Soviet Code of 1923 is prefaced by a clause paramount which is to the following effect: '*Civil rights are protected by the law except in those cases in which they are exercised in a sense contrary to their economic and social purpose.*'[71] This declaration is supplemented by Art. 30 of the Code which declares any act in the law to be void if it is done 'with a purpose contrary to law or for the purpose of evading the law.' Such acts are also declared to be treasonable (acts against the State) and appear punishable as such.[72] Intention to inflict harm ceases to be a criterion, and individual rights are relegated to the background, because the only test is whether an act is

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[67] See the excellent summary of the case law in Williams, *op. cit.* p. 158 *et seq.*

[68] Swiss Code of Obligations, Art. 41 (2).

[69] *E.g.* Civil Code, Arts. 528, 547, 600, 661, 662, 673, 674, 714, 727, 728, 738, 855, 865, etc.; Code of Obligations, 64, 65, 167, 463, 790.

[70] Cf. Williams, *op. cit.* Ch. VIII.

[71] Patouillet, *Les Codes de la Republique Sovietique*, vol. ix, in the *Bibliothèque de l'Institut de droit comparé de Lyon.*

[72] *Ibid.*

injurious to the interests of the State or not.[73] M. Josserand hails this abandonment of any reference to *animus vicini nocendi* or to the infliction of harm on others as the 'solemn consecration of the supremacy of the social purpose of the law,'[74] a declaration which is a clear indication of the ultimate aim of the sociological school of legal philosophy.

The operation of these rules must remain a matter of uncertainty, owing to our almost total lack of knowledge of the manner in which the Soviet legal system functions in practice. It must be remembered, however, that Soviet law presents a strong analogy to so-called martial law. It is only intended to apply to transitory conditions, and it is in reality an instrument of class warfare employed for the purpose of annihilating class distinctions, and is in fact designed to lead up to a state of society in which rules of law become superfluous. For this reason these sections of the Soviet Code, interesting though they may be from the experimental point of view, cannot be regarded as a solid contribution to the solution of the legal problem of the abuse of rights. It may perhaps also be observed that a rule which leaves it to the discretion of a judge to determine the social or economic purpose of a statute, is open to grave objection. The political prejudices of the individual cannot fail to tincture his interpretation of a rule of this kind, and no judge should be placed in the invidious position of being compelled to adjudicate in such circumstances.

Conclusions.

It is beyond doubt that the theory of abuse has obtained a footing, in one form or another, in most of the continental systems of law. It is also clear that the continental judges can employ it for the purpose of defeating any attempt to utilize a rule of law for a dishonest purpose. But in no case, excepting that of the Swiss and Soviet Civil Codes, do we find any real attempt to define the content of the theory, and it must still be considered to be uncertain both as regards its basis and the degree to which it is applicable to the exercise of legal rights. There is, it is true, a factor which is common to all continental systems of law in the recognition of the principle that a proprietary right must not be utilized for the sole purpose of injuring one's neighbour, but when we go beyond

[73] Nolde (*Bulletin de la Société de legislation comparée*, 1923, p. 231) states that the draftsman of the Code was deeply influenced by the theories of Duguit as to the non-existence of rights.

[74] *Op. cit.* p. 275.

this point the question becomes veiled in mist and it is impossible to define the limits within which effect will be given to the theory. The conversations which I have had with continental lawyers have left me with the impression that '*abus de droit*' is regarded as a dangerous expedient, which should only be utilized to prevent manifest injustice. The nebulous character of the rules which have been formulated is due to the fact that it is considered to be undesirable to specify them with precision for fear lest they should come to be recognized as embodying a principle of general application. The concept of abuse is thus purposely left vague, and the judges are trusted to apply it only when the circumstances are such as to show that a right is being employed deliberately with a disregard for the interests of other persons, and is '*unsittlich*' in the sense of Art. 826 of the German Civil Code.[75]

We cannot, however, dismiss the theory from consideration on the ground that it is a pure piece of sentimentality which cannot be reconciled with the axiomatic character of our Common Law, and should, therefore, be abandoned to the continental lawyers to make what they please of it. For one thing it is frequently invoked in aid, more especially by the weaker countries, as a principle which should be applied by the Permanent Court of International Justice in the settlement of disputes between nations.[76] It may be used in argument against us in international litigation and we must, at all events, understand what the theory connotes and be prepared to meet a case which is based on it. But there are other grounds for taking the matter seriously. The absolutist theory of rights is one which stands condemned on moral grounds, and its application, in all its rigour, can only be justified if it is established beyond doubt that any departure from the principle of absolute rights would involve consequences which are equivalent to or more serious than the evil which it is desired to counteract. May I repeat that the problem is one of practical importance, but this should not cause us to exclaim '*nolumus leges Angliae mutari*' and to refrain from any further investigation of the question.

It would seem that the theory of abuse in its entirety is open to grave objections which fall under two headings. In the first place, as we have seen, it may get out of hand and result in

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[75] See the views expressed by Capitant, *Revue Trimestrielle de Droit Civil*, 1928, p. 371.

[76] The necessary opening for this argument is furnished by Art. 38 of the statute of the Court, which directs it to apply 'the general principles of law recognized by civilized nations.'

serious inroads on individual rights, thus becoming an instrument of dangerous potency in the hands of the demagogue and the revolutionary. It resembles a drug which at first appears to be innocuous, but may be followed by very disagreeable after effects. Like all indefinite expressions of an ethical principle it is capable of being put to an infinite variety of uses, and it may be employed to invade almost any sphere of human activity for the purpose of subordinating the individual to the demands of the State. It also furnishes a convenient pretext to recalcitrant debtors who may use it in order to shelter themselves behind a plea that creditors are acting oppressively; in fact it embodies a 'slogan' which is perpetually on the lips of everyone who maintains that he ought not to be compelled to recognize a right which is vested in some other person.

The second objection is one which is equally important though it is of a practical nature. The theory of abuse cuts across the line of many fundamental principles of the English law of torts, such as the rules relating to nuisances; to malicious prosecutions; to the right of fair comment and to the elaborate system which Parliament has built up for the regulation of conflicts between employers and workmen.[77] These are, to a very large extent, dealt with on the Continent by the theory of abuse and its kindred doctrines. A considerable portion of the area ascribed to the theory of abuse by continental law is already covered in English law either by the common law rules of tort or by statute. It would be unreasonable to expect us to demolish and rebuild a great part of our existing system merely for the purpose of facilitating the acceptance of a theory of so vague and indefinite a character.

These are cogent arguments, but they do not appear to be applicable to the situation which arises when a proprietary right is being exercised from a wholly improper motive. The law should be made strong enough to intervene in such cases and to prevent a repetition of such forms of spiteful malevolence and repulsive chicanery as are illustrated by the conduct of the defendants in *Mayor of Bradford* v. *Pickles* and the *Affaire Clément-Bayard*. The Germans have put a stop to this particular form of pettifogging spite, and there seems to be no valid reason why we should not in this instance take a leaf out of their statute book, and enact some measure of the kind which is typified by Art. 226 of the Bürgerliches Gesetzbuch. A rule framed along these lines would be a useful supplement

[77] It would also be necessary to remodel our doctrines relating to civil conspiracy, though this would no doubt cause little regret.

to our law of nuisance, and would meet the difficulty covered by the borderline cases. There is also room for an amendment of our law in the direction of affording protection to an individual against the improper use by others of his name or portrait, *e.g.* for advertising purposes.[78]

The extension of the principle to other rights would appear to be of doubtful expediency. Our law has in effect been developed to meet many of the worst excesses of legalism which fall under the description of abuses of contractual rights,[79] and the risk of any further extension would seem to outweigh any advantages which might be gained. However much we may desire to prevent unscrupulous and malignant persons from carrying on their intrigues behind a screen of feigned legality, we may well pause before we give general recognition to a theory which purports to secure an equipoise between rights vested in different persons, but which may in effect be destructive of the liberty of the individual.

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[78] See L. Q. R. vol. xlvii, at pp. 23 and 203.
[79] See *ante*, p. 30.

ROMAN LAW IN AULUS GELLIUS.

D. T. Oliver.

THE addition, four years ago, to the Loeb Classical Library of the *Noctes Atticae* of Aulus Gellius has made available to English readers in a most convenient form a work of great interest and value to students of Roman Law. The Latin text has been edited with an English translation by Dr. Rolfe of the University of Pennsylvania, who appears to me to have performed a difficult task in a most satisfactory manner, and although, perhaps, not above criticism in dealing with some passages of technical import, to have produced a translation which will rank as the standard English version of this work for many years. In the extracts quoted from the work in this paper I have freely availed myself of Dr. Rolfe's translation, making only such modifications as will, I think, bring out more accurately words or passages of technical application.

Noctes Atticae is a collection of memoranda of a most miscellaneous description, dealing with literary and grammatical criticism, philosophy, law, history and antiquarian topics: it takes its title, as the author states, from the fact that it was commenced when he was studying at Athens, and was intended to be a record of the matters which were the subjects of discussion during the long winter nights in the circle which he frequented there. He appears to have continued to add to his notes throughout his life and they extend to twenty books.

To legal students the interest of the work lies chiefly in the references contained therein to the XII Tables and other institutes of early Roman law; but scattered through the work are many other matters which are instructive, having regard to the fact that the author appears to have been engaged at some periods of his life in legal practice as an advocate and occasionally acted in the capacity of *iudex* in private suits. The exact date of his birth is uncertain, but it has been inferred from some references in his book to have been about 130 A.D., and he survived into the reign of Marcus Aurelius. He was consequently a contemporary of the author of the Institutes of Gaius; and this gives an additional interest to the legal passages in

his book, as most of these must have been taken from material which would be equally available to the writer of the Institutes. It is interesting, therefore, to compare the treatment by Gaius of such topics as Adoption and *Furtum* with the references to the earlier jurists contained in this work.

We have some glimpses of Gellius himself engaged in the work of the Courts. In XIV. 2. he says: 'At the time when I was first chosen by the praetors among the *iudices* to take charge of those actions which are called "private," I sought for books dealing with the duty of a judge written in both languages, so that, being a young man, summoned from the stories of the poets and the epilogues of rhetoricians, to adjudicate in litigation, I might, since, so to speak, the living voice was lacking to me, make acquaintance with judicial matters from "mute teachers," as they term them. And with regard to postponements and delays in suits and certain other legal forms, I was instructed and assisted by the *lex Iulia* (probably the *lex Iulia iudiciaria*) itself and by the commentaries of Masurius Sabinus and some other jurists. But in those complicated cases which often arise and in the doubts engendered by conflicting opinions, such books gave me no help at all. For although the decisions of judges should be formed from the circumstances of the cases before them, yet there are certain general principles and precepts with which the judge should be forearmed and prepared in order to deal with the uncertain event of future difficulties. For example, the following problem, offering an unsolvable difficulty in coming to a decision, was presented to me:—

'A sum of money was claimed before me which was said to have been paid and counted out (*pecunia numerata*), but the plaintiff did not support his case by witnesses, relying only on slender arguments. It was clear, however, that he was a thoroughly good man, of well-known and proved integrity and of blameless life, and striking instances of his probity and honesty were presented. On the other hand, the defendant was shown to be of no substance, to be of base and evil life, often convicted of mendacity and full of treachery and fraud. Nevertheless he with his numerous advocates loudly contended that the payment of the money should be proved in the usual modes, either *expensi latione* (by entry in the ledger), *mensae rationibus* (bankers' receipts), *chirographi exhibitione* (production of a chirograph), *tabularum obsignatione* (a sealed document) or *testium intercessione* (testimony of witnesses); and if the claim was not proved in one of these ways, that the defendant ought

clearly to be absolved and his adversary condemned *de calumnia* (on account of vexatious litigation); that the testimony relating to the life and conduct of the two parties was irrelevant; that this was a case of claiming money before a private *iudex* and not an investigation of morals by the censors.'

Gellius thereupon consulted some friends of great legal experience, but was advised that there was no doubt that the defendant should be acquitted and that it was no use protracting the proceedings since the plaintiff could not produce the legal evidence required. However, he states that he did not feel satisfied and ordered a postponement. He then consulted Favorinus, a well-known philosopher of that period. The latter proceeded to discuss various aspects of a judge's functions, but ended by advising a decision in favour of the plaintiff on the ground of his creditable character. Gellius tells us that he thought it would show presumption on his part, as being then young and inexperienced, to condemn the defendant in the absence of the legal evidence usual in such cases, but that he could not make up his mind to give him absolution, and consequently took the oath '*mihi non liquere*,' *i.e.* that the case was not clear to him. In these circumstances a new *iudex* would be appointed, *translatio iudicii* (see Buckland, Text Book, p. 635).

In a later passage (XII. 13.) Gellius mentions his appointment as a *iudex extra ordinem* by the consuls. This is interesting as an example of the development, parallel with the ordinary procedure (*ordo*), of the Imperial administrative procedure (*extra ordinem*), under which the whole suit was dealt with by the judge-delegate, an appeal lying to the appointing magistrate. (Buckland, p. 663; Willems Droit Public (5th ed.), p. 478; D. 49. 1. 1.)

The reference to the appointment occurs as an introduction to a discussion of the interpretation of the phrase '*intra Kalendas*.'

'When I had been appointed by the consuls as a *iudex extra ordinem* at Rome and instructed to give judgment "within the Kalends," I asked Sulpicius Apollinaris, a learned man, whether the phrase "within the Kalends" would be held to include the Kalends themselves, and I told him that the Kalends had been set as a limit for my delivery of judgment.'

Just as in our day the history of English law and the interpretation of early statutes like *Magna Carta* have become subjects of investigation and discussion by the more cultured lawyers and laymen alike, so at Rome we find the XII Tables

and the institutions of the early *ius civile* a constant theme for discussion among the jurists, historians and philosophers of the later Republic and early Empire. The passages in which Gellius speaks of the XII Tables are amongst the most interesting in his book and have been of particular value to historians of Roman law as purporting to give the actual wording of several of the laws included in that code.

In XX. 1. he gives a vivid description of a discussion between the jurist Sextus Caecilius Africanus and the philosopher Favorinus on the merits of the Decemviral legislation. 'It chanced that as we were waiting to pay our respects to Caesar (Antoninus Pius), the philosopher Favorinus met and accosted Caecilius in the Area Palatina, in my presence and that of many others. In the conversation which they carried on at the time mention was made of the laws of the Decemvirs. . . .' Caecilius having said that they had been drawn up in very neat and concise terms, Favorinus remarks: 'It may be as you say in the greater part of those laws; for I read the Twelve Tables with as keen an interest as I did the twelve books of Plato "On the Laws." But some of them seem to be either very obscure or harsh, or, on the other hand, too mild and lenient, or by no means to be interpreted exactly as they are written.' The jurist meets this criticism by pointing out that any obscurity that attaches to these laws must not be imputed to their framers, but to the ignorance of those who cannot follow their meaning, which must be interpreted in the light of old words and customs which have become obsolete by lapse of time, no less than 600 years having elapsed since these laws were compiled. He goes on to deal with the charge of harshness. 'What can be considered harsh in those laws?—unless you think that a law is harsh which punishes with death a judge or arbiter appointed by law who has been convicted of taking bribes for giving judgment, or which hands over a thief taken in the act to be the slave of the person from whom he stole, and makes it lawful to kill a nocturnal thief. Tell me, I pray, tell me, most profound student of philosophy, whether you think that the perfidy of a judge who sells his oath contrary to all laws, human and divine, or the intolerable audacity of the manifest thief or the treacherous violence of the nocturnal footpad, does not deserve the penalty of death?' Favorinus replies that Caecilius need not ask him for his opinion, as it is the practice of the sect to which he belongs to inquire and not to decide, but he goes on to say that the Roman people, no insignificant judge, had shown that they considered punishments of

that kind too severe, for they had allowed the laws which prescribed such excessive punishments to become obsolete from disuse and old age. In the same way they had disapproved of the provision that a person summoned to Court who is disabled by sickness or age need not be provided with a covered wagon (*arcera non sternitur*), the XII Tables having stated that it was sufficient to carry him on a beast of burden (*iumentum*). 'For why should one who is suffering from disease and not fit to appear to answer for himself be haled into Court by his adversary, clinging to a draught animal?'

The philosopher then proceeding to support his statement that some of the decemviral laws were too lenient, asks: 'Do not you yourself think that law too lax, which reads as follows with regard to the penalty for *iniuria*, "Si iniuriam alteri faxsit, viginti quinque aeris poenae sunto" [If any one has inflicted injury upon another let the penalty be twenty-five *asses*]. For who will be so needy that a fine of twenty-five *asses* would deter him from inflicting *iniuria* if so inclined?' He cites Labeo as disapproving the law and quotes the story of Veratius from Labeo's work *Ad Duodecim Tabulas*. 'A certain Lucius Veratius was an exceedingly bad man and of cruel brutality. He was in the habit of amusing himself by striking free men in the face with his open hand. A slave followed him with a purse full of *asses*; as often as he had slapped anyone, he ordered twenty-five *asses* to be counted out at once according to the provision of the XII Tables. In consequence (says Labeo) the praetors afterwards decided that this law was obsolete and to be ignored, and declared they would appoint *recuperatores* to assess damages.'

Favorinus then points out that some of the provisions of the XII Tables are impracticable and gives the provision as to retaliation and the harsh penalty on judgment debtors as examples. 'Some things in those laws have been seen to be not even practicable, as I have said, such as that *lex talionis*, the words of which, unless my memory deceives me, are as follows: "Si membrum rupit, ni cum e pacto, talio esto" [If one has broken another's limb, there shall be retaliation, unless a compromise is made].' He proceeds to demonstrate the impossibility of effecting retaliation. He then passes on to the provisions regarding judgment debtors. 'But concerning the cruelty of cutting-up and dividing a man's body, if an individual is condemned for debt and adjudged to several creditors, I do not care to call this to mind and I am ashamed to mention it. For what can seem more savage, what more incon-

sistent with humanity, than for the limbs of a poor debtor to be divided by the most cruel mangling, just as at the present time his goods are sold in lots?'

The jurist thereupon, after complimenting the philosopher on his knowledge of the ancient law, enters on an elaborate defence of the policy of the decemviral legislation. 'Depart, I pray, a little from that academic manner of arguing of yours, and laying aside the passion for attacking or defending anything whatever according to your inclination, consider more seriously what is the nature of the matters which you have censured, and do not scorn those ancient laws merely because many of them the Roman people themselves have now ceased to use. For you surely are not unaware that according to the manner of the times, the conditions of governments, considerations of immediate utility, and the prevalence of vices which require correction, the advantages and remedies offered by the laws are often changed and modified and do not remain in the same condition. . . . What seemed more salutary than that law of Stolo limiting the number of acres? What more expedient than the *plebiscitum* of Voconius regulating the inheritances of women? What was thought so necessary for checking the luxury of citizens as the law of Licinius and Fannius and other sumptuary laws? Yet all these have been wiped out and buried by the wealth of the State as if by the waves of a swelling sea.' He proceeds to dispute the charge of inhumanity in relation to the summons to Court and quotes the words of the law: 'Si in ius vocat: Si morbus aevitasve vitium escit, qui in ius vocabit iumentum dato; si nolet, arceram ne sternito,' pointing out that *morbus* does not mean a dangerous sickness and is to be distinguished from *morbus sonticus* (a serious disease), the term used in another of the provisions of the Tables, and that *iumentum* in early times was also applicable to a vehicle drawn by yoked animals, *arcera* being a wagon covered and enclosed on all sides like a chest, and strewn with vestments, in which men who were seriously ill or disabled by age used to be carried lying down. 'What harshness then does there seem to you to be in requiring that a vehicle should be furnished for a poor or needy man summoned to Court if haply through lameness or some other mischance he was unable to walk; and in not directing that a closed wagon be luxuriously strewn, when a conveyance of any kind was sufficient for the invalid?'

Passing to the criticism of the mildness of the penalty for *iniuria*, he points out that for more serious assaults there were heavier penalties. 'They did not, my dear Favorinus, by any

means compensate all injuries by that trifling sum, although even that small number of *asses* meant a heavy weight of copper; for the *as* which the people then used weighed a pound. But more cruel injuries, such as breaking a bone, inflicted not only on freemen but even on slaves, they visited with a heavier fine, and for some injuries they even prescribed retaliation.' He then meets the objection to the impracticability of retaliation by contending in effect that the provision is really *in terrorem* to secure agreement to compensate. As to the charge of the harshness of the penalty, he says: 'But since you think that this kind of punishment is harsh, what harshness, pray, is there in doing the same thing to you which you have done to another? especially when you have the opportunity of compromising, and when it is not necessary for you to suffer retaliation unless you choose that alternative. As for your idea that the praetor's edict was preferable in taking cognizance of injuries, I want you to realize this, that this retaliation also was wont of necessity to be subject to the discretion of the judge. For if a defendant, who refused to compromise, did not obey the judge who ordered retaliation, the judge after making an assessment fined the defendant a sum of money; so that if the defendant thought a compromise hard and retaliation cruel, the severity of the law was limited to a fine.' The latter part of this passage throws some light on the manner in which the early praetors applied the talion clause of the XII Tables in practice.

The jurist then attempts a defence of the severity of the early law in the treatment of judgment debtors. This part of the discussion is of particular interest, for in the course of his apology he purports to give the actual words of the XII Tables which deal with the enforcement of debts. After asserting that regard for good faith in matters public and private was a distinguishing feature of the Roman people (an assertion which no unprejudiced student of their history would admit), he proceeds to say that this faith was enforced by their forefathers not only in public functions, but in private transactions and particularly in the use and interchange of borrowed money, 'for they thought that this aid to temporary need, which is made necessary by the common intercourse of life, was lost if perfidy on the part of debtors escaped with slight punishment.'

'Therefore,' he continues, 'in the case of those who have admitted debt, and also judgment debtors, thirty days were allowed for raising the money to pay, and those days the *decemviri* called "*iusti*" as constituting a kind of moratorium and suspension of proceedings during which

no action could be taken against them. Then afterwards, unless they had paid, they were summoned before the praetor and were handed over by him to those to whom they had been adjudged indebted and were also secured with a thong or fetters. For such, I think, is the meaning of the words of the law: "Aeris confessi rebusque iure iudicatis triginta dies iusti sunto. Post deinde manus iniectio esto, in ius ducito. Ni iudicatum facit aut quis endo eo in iure vindicit, secum ducito, vincito aut nervo aut compedibus. Quindecim pondo ne minore aut si volet maiore vincito. Si volet suo vivito. Ni suo vivit qui eum vinctum habebit, libras farris endo dies dato. Si volet plus dato." In the meantime there was the right of making a compromise, and if no compromise was made the debtors were held in confinement for sixty days. During that time, on three successive market-days, they were brought before the praetor and the amount of the judgment debt proclaimed. But on the third market-day they were capitally condemned or were sent across the Tiber to be sold abroad. But they made this capital punishment terrible by a show of cruelty and by inspiring fear by unusual terrors, for the sake, as I have said, of making faith sacred. For if there were several to whom the debtor had been adjudged, the laws allowed them to cut the man who had been made over to them in pieces, if they wished, and to share his body. And indeed I will quote the actual words of the law lest perchance you may think that I am afraid of their hateful character: '"Tertiis nundinis partis secanto. Si plus minusve secuerunt, se fraude esto." Nothing certainly can be more merciless, nothing less humane, unless, as is evident on the face of it, such a cruel punishment was threatened that they might never have resort to it.'

Here, as in the case of the talion clause, the jurist's plea is that the apparent severity of the decemvirs is purely *in terrorem*, and he goes on to state a fact of some importance, *viz.* that he had never read or heard of a case in which the body of a defaulting debtor had been divided among the creditors.

On the termination of this discussion Gellius tells us that the party separated, as it was announced that the Emperor's reception had begun.

There are further references to the text of the XII Tables in XVI. 10. where Gellius gives us a picture of a social function during a period of cessation of forensic business, at which one of the books of the Annals of Ennius was being read to a large gathering. In one of the lines the expression '*proletarius*' occurred. A question was raised as to its meaning.

He proceeds: 'Seeing in that company a man who was skilled in the civil law, a friend of mine, I asked him to explain the word to us; and when he rejoined that he was an expert in civil law and not in matters of grammar, I said, "You especially ought to explain this, since, as you declare, you are skilled in civil law. For Ennius took this word from your XII Tables, in which, if I remember aright, it is thus written, 'Adsiduo vindex adsiduus esto. Proletario iam civi quis volet vindex esto.' We therefore ask you to consider that, not one of the books of the Annals of Quintus Ennius but the XII Tables are being read, and interpret the meaning of *proletarius civis* in that law." "It is true," said he, "that if I had learned the law of the Fauns and Aborigines I ought to explain and interpret this. But since *proletarii, adsidui, sanates, vades, subvades, viginti quinque asses, taliones,* and the inquest of thefts *cum lance et licio* have disappeared, and all the ancient lore of the XII Tables, except in the case of *legis actiones* in centumviral causes, has been laid to rest by the Aebutian law, I am only obliged to study and acquire the knowledge of the statutes and legal terms which are now in actual use." Then, by chance, we caught sight of Julius Paulus, the most learned poet within my recollection, who was passing by.' They apply to him and receive a lengthy explanation.

In addition to the passages already cited and the interesting summary of the provisions relating to Furtum to be mentioned later, there are numerous incidental references to the XII Tables scattered through the work.

In XV. 13. two texts are reproduced: 'Moreover *confessio aeris,* meaning a debt of which admission is made, is referred to in the XII Tables in these words: "Aeris confessi rebusque iure iudicatis xxx dies iusti sunto."'. Also from the same Tables this comes: "Qui se sierit testarier libripensve fuerit, ni testimonium fariatur, improbus intestabilisque esto."'

In VIII. 1. it is pointed out that the form *nox* is used for *noctu* in the Tables.

In I. 12. an account is given of the ritual concerned with the choosing of Vestal Virgins, and a quotation is given from Labeo's Commentary on the XII Tables: 'A Vestal virgin is not heir to any one dying intestate nor can any one succeed to her on intestacy, but her property, they say, goes to the public treasury. On what legal principle this takes place is a question.'

Earlier in the same title it has been stated that the Vestal, on being chosen, passes out of the *potestas* of her father without

the ceremony of emancipation and acquires the right to make a will.

In III. 2. there is a discussion of the different modes of legal reckoning of the day by various peoples, and after stating that the Romans reckoned each day from midnight to the next midnight, Gellius goes on to say: 'I have read that Quintus Mucius (Scaevola), the jurist, also used to say that a woman did not complete *usurpatio* (by breaking the currency of *usus*) who, after entering on marriage relations with a man before the Kalends of January, absented herself for the purpose of *usurpatio* on the fourth day before the Kalends of the following January; for the period of three nights during which the XII Tables provided that a woman must be absent from the husband for the purpose of breaking the use could not be completed, since the last six hours of the third night belonged to the next year which began on the Kalends (January 1).'

There are few references to the Edicts of the magistrates. In XI. 17. he gives the wording of an edict by one of the early Praetors dealing with the failure to carry out a public contract to clear obstructions from the rivers, and in IV. 2. that of the Edict of the Curule Aediles relating to the sale of slaves: 'Titulus servorum singulorum scriptus sit curato ita, ut intellegi recte possit quid morbi vitiive cuique sit, quis fugitivus errove sit noxave solutus non sit' (Care must be taken that the sale label of each individual slave be written so that it may be known exactly what disease or defect each one has, which one is a runaway or a vagabond, or is still subject to an undischarged noxal liability).

He then goes on to discuss the interpretations put on *morbus* and *vitium*, quoting from the works of Caelius Sabinus on the Curule Aedile's Edict and the work of Masurius Sabinus on the Civil Law.

In VI. 4. he quotes again from Caelius Sabinus in discussing a custom by which slaves for whom the seller assumed no responsibility were sold with caps on their heads. The reason for the custom was, according to Caelius Sabinus, the jurist, that the law required that slaves of that kind should have a mark when offered for sale so that buyers might not be deceived and it would not be necessary to have a special warranty in the conditions of sale, 'but that buyers might perceive with their eyes what kind of slaves they were.'

In III. 16. there is a reference to the *ius trium liberorum*. Dealing with the limits of the period of gestation, he says: 'I recall that this question was carefully and thoroughly investi-

gated at Rome, an inquiry demanded by a question of no small importance, as to whether a child, which had been born alive in the eighth month and had died immediately, satisfied the conditions of the *ius trium liberorum*, since it seemed to some that the untimely period of the eighth month made it an abortion and not a birth.'

In VII. 12. he mentions that Servius Sulpicius, 'the most learned man of his age,' in the second book of his work 'De Sacris Detestandis' erroneously derives *testamentum* from *mentis* and *contestatio*. This may be the source of the similar statement made in Justinian's Institutes, II. 10 pr.

In XV. 27. in the course of explaining the functions of the different kinds of *comitia*, he has an interesting note on early wills which may be compared with Gaius II, 101—104. 'In the first book of the commentary of Laelius Felix on Quintus Mucius (Scaevola) it is stated that Labeo wrote that the *comitia calata* was held on behalf of the college of pontiffs for the purpose of installing the king or the flamens. The *comitia curiata* was one kind of assembly, the *comitia centuriata* another; the *comitia curiata* was summoned, "calari," by a lictor, that is, convoked; the *centuriata* by the hornblower. In the same *comitia*, which we have said was called *calata*, it was customary to effect the renunciation of the family *sacra* and the making of testaments. For we learn that there were three kinds of testament; one which was made in the *comitia calata* before the assembled people, another *in procinctu*, when men were summoned to the battle line for the purpose of fighting, a third by mancipation of the *familia*, recourse being had to the copper and scales (*aes et libra*).' He then goes on to give some further details as to the distinctions between a *comitia* and a *concilium*, as to *plebiscita* before the *lex Hortensia*, and as to differences in the functions of the *comitia curiata* and the *comitia centuriata*, pointing out that the latter must be held outside the *pomerium*.

There are several references to the *Lex Voconia*. In VI. 13. it is mentioned in connexion with a discussion of the word *classici*. 'I have briefly noted this, because in connexion with the speech of Marcus Cato, *Qua Voconiam legem suasit*, the question is often raised as to what is meant by *classicus* and what by *infra classem*.'

In X. 20. we find a discussion of questions of definition similar to those to which we are accustomed in the study of Austin's Jurisprudence. 'I hear it asked what is the meaning of *lex*, what of *plebiscitum*, what *rogatio*, what *privilegium*? Ateius Capito, *publici privatique iuris peritissimus*, defined

what *lex* meant in these words: "Lex," said he, "est generale iussum populi aut plebis, rogante magistratu." '

Gellius proceeds to point out that this would not include *privilegia*, to which the term *lex* is commonly applied, and then quotes Capito as distinguishing the *plebs* from the *populus* and the original signification of *plebiscitum*. He points out that the most general term is *rogatio*, but that it has been the practice to apply the term *lex* to all kinds of enactment.

A note on adoption and adrogation (V. 19.) is important as supplementing the account of these institutions contained in Gaius, I. 97—107, and Justinian's Institutes, I. 11. 'When strangers are taken into another's family and given the relationship of children, it is effected either by the authority of the Praetor or by that of the people. When effected through the agency of the Praetor, it is called "adoptatio," when with the sanction of the people, "adrogatio." The process is "adoptatio" when those who are adopted are surrendered in Court after a third mancipation by the father in whose power they are and are vindicated by the adopter in the presence of the magistrate before whom the legal action takes place. The process is called "adrogatio" when persons who are *sui iuris* place themselves in the *potestas* of another and are themselves responsible for the act. But adrogations are not made without due consideration and investigation; for the *comitia* which is called *curiata* is summoned under the authority of the pontiffs, and inquiry is made as to whether the age of one who wishes to adopt is not rather suited to begetting children of his own; precaution is taken that the property of the person who is being adrogated is not being sought by false pretences; and an oath is administered which is said to have been formulated for use in this ceremony by Quintus Mucius, the *pontifex maximus*. But no one may be adrogated who is not of age to assume the *toga virilis*. "*Adrogatio*" is so called, because this kind of transfer to another's family is effected through a *rogatio* addressed to the people.

'The words of this *rogatio* are these: "Velitis, iubeatis, uti L. Valerius L. Titio tam iure legeque filius siet, quam si ex eo patre matreque familias eius natus esset, utique ei vitae necisque in eum potestas siet, uti patri endo filio est. Haec ita uti dixi, ita vos, Quirites, rogo" (Do you will and ordain that L. Valerius be a rightful and lawful son to L. Titius just as if he had been born of that father and mother and that Titius have power of life and death over him such as a father has over a son. These things as I have stated I thus ask of you, Quirites).

'Neither a *pupillus* nor a woman who is not in the power of her father may be adrogated; since women have no part in the *comitia* and it is not right that tutors should have so much authority and power over their wards as to be able to subject to the control of another a free person entrusted to their protection. Freedmen, however, may legally be adopted by freeborn citizens, according to Masurius Sabinus. But he adds that it is not allowed in practice and he thinks it never ought to be allowed that men of the condition of freedmen should by process of adoption usurp the privileges of the freeborn. "Moreover," says he, "if that ancient state of the law is maintained, even a *slave* may be surrendered by his master through the agency of the praetor with a view to adoption." And he declares that several authorities on the ancient law have written that this can be done.' This last observation evidently refers to the opinion of Cato cited in Justinian's Institutes, I. 11. 12.

It may be remarked that Gellius makes no mention of the *epistula* of Antoninus Pius concerning adrogation of *impuberes*, of which Gaius tells us in I. 102. This may furnish some slender clue to the date at which the note was written.

Gellius describes the early law of theft at some length. In VI. 15. he tells us: 'Labeo in his second book, *De Duodecim Tabulis*, wrote that harsh and severe judgments were passed in respect of theft in the early law, and that Brutus used to say that a man was held guilty of theft who had taken a draught animal to a place other than that for which it had been lent to him for use, as well as one who had driven it further than the place to which he had borrowed it to drive. Accordingly Quintus Scaevola, in the sixteenth of the books which he wrote, *De Iure Civili*, inserted this passage: "If anyone has used something which was entrusted to his care to be kept, or having borrowed anything for use, has applied it to a purpose other than that for which he borrowed it, he is liable for theft."'

In XI. 18., after referring to the drastic legislation of Draco at Athens, punishing with death every kind of theft, and to the milder system of Solon in which thieves were punished by a penalty of twice the value of the things stolen, he gives the following account of the early law, which should be compared with that in the Institutes of Gaius, III. 183—200: 'Our decemvirs, who after the expulsion of the kings, drew up in writing on the Twelve Tables the laws which the Roman people were to use, did not employ equal severity in punishing thieves of all kinds, nor, on the other hand, was there undue lenity. For they permitted a thief who was caught in the act to be

killed only if it was night time when he committed the theft, or if in the daytime he defended himself with a weapon when caught. But in the case of other thieves taken in the act, if they were freemen they (the decemvirs) ordered that they should be scourged and adjudged in bondage to him against whom the theft had been committed, provided they had committed the theft in daylight and had not defended themselves with a weapon. Slaves committing manifest theft were to be scourged and thrown from the (Tarpeian) rock, but they decided that boys under the age of puberty should be flogged at the discretion of the Praetor and satisfaction made for the damage done by them. Those thefts which were *per lancem liciumque concepta* were punished as if they were manifest theft.

'But now we have departed from that law of the decemvirs. For if anyone wishes to resort to the ordinary process for manifest theft, an action for fourfold is given. Manifest theft, as Masurius (Sabinus) says, is one in which a thief is caught in the act. The act is finished when the stolen property has been carried to its destination. The penalty for *furtum conceptum* and likewise for *furtum oblatum* is threefold.

'But anyone who wishes to learn what the meaning of *oblatum* is, and what *conceptum*, and many other matters not useless or irrelevant to know, will find the information in the book of Sabinus entitled *De Furtis*. In which it is stated, contrary to the common impression, that theft may be committed not only in respect of men and movable objects which can be taken and carried away secretly, but also of land and houses; also that a *colonus* (tenant-farmer) was condemned for theft who had sold the farm which he had taken on lease and had deprived the owner of its possession. And Sabinus says this also, which is more surprising, that a man has been held guilty of *furtum* (*ope et consilio*) of a slave, who when the fugitive chanced to pass within sight of the master, held out his gown, as if putting it on, and so prevented the master seeing the fugitive.

'Then for all other thefts, which were called "non-manifest," they imposed a twofold penalty.'

After briefly referring to the views of the ancient Egyptians and Lacedaemonians on the subject of theft, he returns to the commentary of Sabinus. 'I think I should not omit to show how righteously and strictly theft has been defined by the wisest men, lest anyone should think that he only is a thief who privately purloins anything or secretly carries it away. The words of Sabinus in the second book of his *De Iure Civili* are: "He is liable for theft who has handled anything belonging to

another, when he has reason to know that he does so against the owner's will." Also in another chapter: "Whoever silently carries off another's property with the purpose of making gain is guilty of theft, whether he know to whom the thing belongs or not." Thus has Sabinus written, in the book which I have just mentioned, concerning the handling of things with the purpose of stealing them. But we ought to remember, according to what I have written above, that theft may be committed even without any handling, the mind alone and the intention being directed to the commission of the theft. Hence Sabinus says that he has no doubt that a master should be convicted of theft who has ordered his slave to steal something.'

In conclusion, I cannot refrain from repeating a quotation from a speech of Cato, introduced by Gellius somewhat irrelevantly in the course of the foregoing discussion, which he says pleased him greatly: 'Those who commit private theft pass their lives in confinement and fetters; plunderers of the public in purple and gold.' In this matter the modern world shows little advance on the ancient.

MENS REA AND MOTORISTS.

A Memorandum for Students.

J. W. Cecil Turner.

THE ever-increasing number of deaths caused by accidents in which motor vehicles are involved has naturally suggested to many people's minds that some alteration in our law is required. This is an idea not confined to laymen, for there are frequent references to the matter in the legal periodicals [1]; it has been publicly discussed by practising lawyers and the attention of the Legislature has been directed to the problem of devising some new enactment.

It might be expected that on a subject so much discussed there should at any rate be no doubt as to what are the principles of our law as it now exists, but this is certainly not apparent in the articles and statements that have been published and reported since this mischief began to attract so much notice. And yet, as I shall attempt to shew, these principles are simple enough. It is however no new thing that confusion in law should be caused by failure to remember and apply elementary principles. Complaints have been made that petty juries are obstinately unwilling to convict motorists for manslaughter. The word 'manslaughter' suggests to many lay minds some kind of brutal criminality; they find an incongruity in associating it with a prisoner of respectable appearance. It has further been observed that when a jury hear judge and counsel discussing the legal points of the case in terms which suggest that there is some difficulty in ascertaining the law of the matter, they nearly always acquit the prisoner. Counsel for the defence therefore must welcome any obscurity in the legal principles adduced in such a case as a valuable assistance in raising reasonable doubt even as to the facts. The chief reason, however, for the confusion lies in the unfortunate ambiguity of the technical language used in the Courts and in the text-books. It must be respectfully assumed that the Bench has clear ideas as to the legal principles which it applies, but with equal respect

[1] *E.g.* Law Journal, vol. lxxi, p. 437, vol. lxxiv, pp. 128, 289, 381.

it may be suggested that the language in which they are expressed is such as to need a great deal of explanation for students, and it is for students that the present article is written.

Manslaughter is a crime at Common Law. It has been defined as a felony which 'consists in killing another person unlawfully yet under conditions not so heinous as to render the act a murder.' It is spoken of as 'committed without any of those *more guilty* forms of malice which amount to Murderous Malice.'[2] Being a crime at common law the principles expressed in the ancient maxim '*actus non facit reum nisi mens sit rea*' must apply to it. In this maxim an '*actus*' is human conduct producing a result. It may be a result to which law is indifferent, or it may be a result which it is the aim of law to prevent. In the latter case the result is traditionally described by the uncouth expression '*actus reus*,' which may be translated 'unlawful act' in the sense of indicating that it is a result forbidden by law, produced by human conduct. The whole maxim means that although an act be 'unlawful' the person who has done it will not be liable to criminal punishment unless his conduct in the matter was inspired by a state of mind which is called *mens rea*. Whether a given act is unlawful (*i.e.* an *actus reus*) or not will depend upon the circumstances. To take as an example the infliction of bodily harm. In certain cases law permits the infliction of bodily harm; for instance, in the course of a sport such as boxing (not prize fighting), or again in the performance of a surgical operation by a qualified surgeon. The boxer who in the course of the contest has succeeded in his endeavour to strike his opponent upon the nose, has committed a lawful act and not an unlawful one. He is therefore not criminally liable although he had abundant intention (*mens rea*) to inflict that blow. If, however, in the street after the contest was over, he were to strike his opponent an exactly similar blow, he would be criminally liable, because to strike the blow in these circumstances would be unlawful (an *actus reus*) and his intention to strike is the same as before. Again, suppose that while in the ring, dazed by his opponent's blows, he had mistaken the referee for his opponent and had struck that official, this would have been an unlawful blow. He would not, however, have been criminally liable, because he could rely on the defence of mistake as disproving *mens rea*. For if a man acts under reasonable mistake of fact he is treated, for the purpose of measuring his criminal liability, as though the facts were as he supposed

[2] Kenny, Outlines of Criminal Law (14th ed.), p. 115.

them to be, *i.e.*, in the present case, as though he had actually struck at his opponent. In these sport and surgery cases the basis of lawfulness is the consent of the person harmed. Law permits the giving of consent to risk or receive bodily harm in athletic exercises, or under the knife of a qualified surgeon after an honest diagnosis. It does not allow consent to receive harm in a prize fight, a duel, or at the hands of an unqualified operator. Of course, even where consent is allowed by law, it is necessary for the accused person to establish that the victim did in fact consent to risk or receive the harm he has suffered. A patient only consents to undergo an operation on the understanding that the surgeon, however highly qualified, will devote his utmost skill and attention to it, and will expose him to no more pain and danger than is necessary.

Of the *actus reus* in manslaughter it is necessary to say very little. Students must remember that it is exactly the same in manslaughter as in murder. The prosecution must establish beyond reasonable doubt that the unlawful act of the prisoner caused, accelerated or contributed in a substantial degree to the death of the victim. In certain cases proof of a sufficient *actus reus* may give trouble through the difficulty of establishing the unlawfulness of the prisoner's act,[3] or that his act did contribute in a sufficiently proximate degree to the death.[4] These difficulties, however, will seldom arise in the kind of manslaughter now under consideration.

It is in connexion with the *mens rea*, the guilty state of mind of the prisoner, that the complications occur. Elementary though the subject be, it is necessary to state the meaning of this expression. At common law there are two, and only two, kinds of *mens rea*. The first is the state of mind of the man who does an act (or omits to act when it is his duty to act), foreseeing the possible consequences of that act (or omission), and with the desire to bring about those consequences. For example, I steer my car at you, realizing, and desiring, that I may injure you. Or again, I purposely omit to supply nourishment to an infant child for whom I am responsible, so that it starves to death. This is usually termed Intention.[5] The second is the state of mind of the man who acts (or omits to act when it is his duty to act), foreseeing the possible consequences of that act (or omission), but with no desire to bring

[3] *E.g. R.* v. *Cheeseman* (1836) 7 C. & P. 455; *R.* v. *Shepherd* (1862) L. & C. 147; *R.* v. *Edwards* (1838) 8 C. & P. 611; *R.* v. *Smith* (1849) 11 Cox 210.

[4] *E.g. R.* v. *Macdaniel* (1756) 1 Leach 44; *R.* v. *Holland* (1841) 2 Moody & Rob. 351; *R.* v. *Sawyer* (1887) 106 Sess. Pap. 301.

[5] Austin, Jurisprudence (4th ed.), vol. 1, p. 434.

them about. It may be that he does not care whether they happen, or do not happen, or it may be that he hopes that they will not happen; in either case, however, he does not *desire* them to happen. The point is that he persists in a course of conduct which he realizes may produce those consequences.[6] If those consequences amount to a result forbidden by criminal law, an *actus reus,* then he will be criminally liable. For example, wishing to get to my destination quickly I drive my car at a high speed through a crowded street, realizing that there is a chance I may injure someone although I do not desire that harm to happen. It is most unfortunate that our law has no exact and distinctive term of art to indicate this state of mind. For the purposes of the present discussion the word 'Recklessness' will be used to indicate it and the word 'Intention' confined to the former kind of *mens rea.* Austin [7] included it within the term Intention, but he has not been followed by legal practitioners or (save in one passage by the late Professor Kenny [8]) the writers of text-books on criminal law. Strangely enough, it is necessary to go outside criminal law entirely to find the best judicial definition of it, which was given by Eve J., in an Equity case, as 'an attitude of mental indifference to obvious risks.' [9] This, however, is hardly wide enough, for it does not include the case of a man who would much prefer that the contemplated harm, which is being risked, should not happen. Certainly it is not within the ordinary everyday meaning of intention, which always suggests a desire that the consequences shall occur. Nevertheless, it is probably a pity that Austin's word 'Intention' was not adopted, for the ambiguity which it would have introduced could scarcely have caused so much trouble as the expressions which have become current. For, as everyone knows, the word 'negligence' is invariably employed, qualified usually by a vivid adjective such as 'criminal,' 'gross,' 'wicked,' 'wilful' or 'culpable.' [10] It is, however, submitted with emphasis that 'Negligence' is a very different state of mind from those previously considered. It is the state of mind of a man who pursues a course of conduct *without adverting at all* to the consequences of that conduct:

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[6] As Austin (*op. cit.* p. 441) says, 'the party *conceives* the future event, and believes that there *is* a chance of its following his volition or act.' Cp. the German 'Vorsätzlich,' B.G.B. Art. 823.

[7] Austin, *op. cit.* vol. 1, pp. 436, 441, 442.

[8] Kenny, *op. cit.* p. 150.

[9] *Hudston* v. *Viney* [1921] 1 Ch. 98, at p. 104.

[10] See, for example, the different meanings of the word 'negligence' in Kenny's Outlines of Criminal Law (14th ed.), at pp. 122—124, 150, 151, n. 5, 152, 166, 167. Cf. *Vaughan* v. *Menlove* (1837) 3 Bing. N. C. 468.

he does not foresee those consequences, much less desire them. He ought to realize what the event may be, and a reasonable man, in the same circumstances, would be more alert and would modify his conduct accordingly. This being the meaning of the word 'negligence,' as a state of mind, the addition of an adjective, however vituperative, cannot properly alter it. In the accurate use of language an adjective qualifies but does not change the nature of the noun to which it is attached. If, however, the adjective and noun are to be combined so as to produce a composite noun of an entirely different meaning, this must be carefully explained, or confusion may result; a dog does not cease to be a dog because it may be called a white dog, or a black dog; the expression 'hot dog,' however, is one which would require careful explanation should it become necessary to use it in the course of litigation.

It is submitted that at Common Law, negligence in this meaning can never amount to criminal *mens rea.*[11] A great difficulty arises, however, at this point. We cannot enter a prisoner's mind, and therefore we can only surmise the state of it by inference from his acts, *i.e.* through his declarations, or other conduct of his own. That is to say, the *test* of whether a man's state of mind be one of intention, or recklessness, or negligence, must necessarily be objective. On this point the accused person will not help the prosecution, who will find it hard in many cases to shew exactly what his state of mind was, or rather, what it must be deemed to have been, at the time of the events in question.

The available evidence may be ambiguous. The difficulty would be particularly acute if it were necessary to distinguish between intention and recklessness, because in many cases the same facts may equally well indicate either. The main purpose of criminal law, however, is to protect innocent persons from harm caused by others, and this protection is needed no less against those who are reckless or indifferent as to the harm they may cause, than against those (probably a much smaller number) who intend that harm. The intense selfishness of persons who, rather than deny themselves the satisfaction of their own immediate desires, expose another person to risk which they foresee, or to which they deliberately close their eyes, is a social evil which our criminal law very properly represses. So far as liability is concerned then, our law does not distinguish between

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11 'For intellectual defect, for mere mistake of judgement he' (the prisoner) 'cannot be found guilty. That is the subject of the civil remedy': *R.* v. *Elliott* (1889) 16 Cox 710, at p. 713, *per* O'Brien J.; see also Kenny, *op. cit.* pp. 151, 160.

the two states of mind.[12] The position was very much the same in Roman law in reference to responsibility in delict and in contract, and it is indicated in the statement '*culpa lata dolo aequiparatur*,' which does not mean that *culpa lata* is the same thing as *dolus*, but that, equally with *dolus*, it involves legal liability for an unlawful harm caused by it.

On the other hand, in crimes at Common Law a distinction has to be drawn between recklessness and negligence, for the border line of liability lies between the two. If the case be one in which it is not alleged that the accused desired to inflict the harm which was done, the prosecution will have to establish not merely the *actus reus*, but also that the state of mind of the prisoner was 'reckless,' *i.e.* that he realized the obvious risks to which his conduct would expose another person.

Assuming that the *actus reus* is proved (and putting aside the possibility of such a defence as insanity) the accused can only escape if the evidence shews that he was merely negligent, *i.e.* that he did not foresee the possibility of harm resulting from his conduct. He will be unable to do so if the facts shew either that he clearly did foresee it, or that any ordinary person in the circumstances could not, in the opinion of the jury, fail to foresee it. In this latter case the test is clearly objective. As was said by Stephen J. in the case of *R.* v. *Serné and Goldfinch*,[13] 'it is alleged that he' (one of the prisoners) 'arranged matters in such a way that any person of the most common intelligence must have known perfectly well that he was placing all those people in deadly risk. It appears to me that if that were really done, it matters very little indeed whether the prisoners hoped the people would escape or whether they did not.'[14] It is interesting to compare the Roman description of *culpa lata* as 'non intellegere quod omnes intellegunt.'[15]

Applying the foregoing principles to cases of felonious homicide, it follows:—

(1) *Murder.* The prisoner will be guilty of murder (a) if he intended the death, or (b) if he caused it by an act which he intended to do, and which he realized, or must be deemed to have realized, might cause the death of another.[16] Possibly

[12] See *R.* v. *Welch* (1875) 1 Q. B. D. 23; Y. B. 2 Ed. III, f. 18, Hil. pl. 1; *The Harlot's Case*, Crompton's Justice, 24; and the judgments in *R.* v. *Pembliton* (1874) L. R. 2 C. C. R. 119; and *R.* v. *Faulkner* (1877) 11 Ir. Rep. C. L. 8.

[13] (1888) 16 Cox 311, at p. 313.

[14] *R.* v. *Cheeseman* (1836) 7 C. & P. 455; *R.* v. *Griffin* (1869) 11 Cox 402; *R.* v. *Conner* (1835) 7 C. & P. 438.

[15] D. 50. 16. 213. 2.

[16] It will in strict law make no difference whether he intended merely to hurt the victim or had no intention of harming the victim in the slightest degree, provided he realized that there was a risk to another's life in acting as he did.

there are, in addition, some other sets of circumstances which may amount to murder, but it is not the purpose of the present article to analyse murder as a crime. Further, even an unlawful homicide which is intentional may be reduced from murder to manslaughter if the prisoner can establish that he had received sudden and extreme provocation.

It would be an example of (b) to drive a motor car into a crowd of people at such a speed that any ordinary man must realize it would most probably cause death. This is so although juries are usually unwilling to find a verdict of guilty of murder where there is no intention to hurt; but it is possible that this disinclination of the jury would be overcome should there be public prejudice against the accused—for example, supposing a motor bandit in endeavouring to escape from the police killed someone by driving his car with this reckless indifference to the fate of innocent persons who happened to be unable to get out of the way.

(2) *Manslaughter.* Manslaughter has been traditionally divided into two kinds (i) Voluntary, and (ii) Involuntary. It is usual to confine the term ' voluntary manslaughter ' to the case, above mentioned, of an intentional killing which has been committed under sudden provocation (including the case of a sudden combat) so overwhelming that the slayer could not reasonably be expected to retain his ordinary powers of self control, other cases of manslaughter being termed ' involuntary.' [17] The late Professor Kenny, however, included under the head of voluntary manslaughter all cases in which the prisoner had ' the intention of causing to another person some illegal harm—it might be a merely slight, or a grave or even a fatal harm,' [18] while he defined involuntary manslaughter as ' that which is committed . . . by acting in some unlawful manner, but without any intention of killing, or even of hurting, anyone.' [19] Nearly all the cases, however, which Professor Kenny goes on to discuss in illustration of this latter proposition are cases in which the death was caused by a person who must be deemed to have realized the chance of harm (the state of mind which is, in the present article, termed ' Recklessness '), and the remainder are cases in which, it is submitted, there *was* an intention of hurting (although not of killing) someone; for example, those in which a parent chastises a child, and possibly some in which there is neglect to provide food or medical attention.[20] If therefore it

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[17] *E.g.* Archbold (28th ed.), p. 889.
[18] *Op. cit.* p. 116.
[19] *Op. cit.* p. 120.
[20] *Op. cit.* pp. 120—124.

be desired to retain the expressions 'Voluntary' and 'Involuntary' manslaughter, it would appear desirable to employ them in their more usual meanings.

Voluntary manslaughter, or killing under provocation, needs no further discussion because the indictment in such cases is for murder, and it is for the prisoner, if he can, to prove that the provocation he received was so gross as to justify a verdict of manslaughter.

To turn then to the cases of so-called 'involuntary' manslaughter. (a) The prisoner will be guilty of manslaughter if he intended to do an unlawful harm, but not to kill, and used means not intrinsically likely to kill. For example, if a motorist as a practical joke, or out of annoyance because his progress is impeded, were to steer his car slowly against a cyclist, intending merely to make him fall from his machine, and unfortunately caused his death, this would be manslaughter, because to knock a cyclist from his machine, which the motorist intended to do, is to cause him an unlawful harm, and is an assault and battery. This may include conduct of apparent omission, *e.g.* withholding food or medical attention from a person for whom it was the prisoner's duty to care. To cause this kind of bodily suffering in such circumstances is unlawful.[21] The prisoner intended to cause the suffering, but did not intend or foresee its resulting in death.[22]

Further instances are afforded by the cases of manslaughter by correction, where, for example, a parent has caused the death of a child by excessive chastisement.[23] In these cases it is easy to see that the test is objective; reasonable chastisement by a parent is not unlawful, but if the punishment inflicted is unreasonable then an unlawful harm is done, and although it be unlikely to cause death, if death does result, the parent will be guilty of manslaughter. If, however, the punishment be so excessive as to be intrinsically likely to cause death, the crime will be murder. To say that the infliction of excessive punishment is 'doing an act which is quite lawful but doing it negligently and therefore unlawfully'[24] is somewhat misleading. The administration of immoderate chastisement is an unlawful act, not a lawful one; the crime arises from the hurt

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[21] *R.* v. *Marriott* (1838) 8 C. & P. 425; *R.* v. *Saunders* (1836) 7 C. & P. 277; *R.* v. *Jones* (1901) 19 Cox 678.

[22] *R.* v. *Cheeseman* (1836) 7 C. & P. 455; *R.* v. *Griffin* (1869) 11 Cox 402; *R.* v. *Conner* (1835) 7 C. & P. 438.

[23] *R.* v. *Cheeseman* (1836) 7 C. & P. 455; *R.* v. *Griffin* (1869) 11 Cox 402; *R.* v. *Conner* (1835) 7 C. & P. 438.

[24] Kenny, *op. cit.* 124.

done to the child rather than from the manner in which it is done. To cause a child bodily pain by an excessive beating is not punishment but cruelty. If the brutality be carried to an obviously dangerous extent the case will become one of murder.[25]

It is further submitted that an attempt in these cases to distinguish between the amount of the punishment and the instrument used to inflict it[26] tends to obscure the point in issue: a thousand strokes with a cane or one with an iron bar may cause an equally excessive bodily harm.[27]

(b) The prisoner will also be guilty of manslaughter if without desiring to hurt anybody he wilfully acted, or wilfully omitted to act when it was his duty to act, in a way which he realized might cause another some (but not dangerous) bodily harm, or which he must be deemed to have realized might cause such harm.[28] Instances of this kind of *mens rea* are to be found in such cases as *R.* v. *Senior*,[29] where through too great a belief in religion or too little in therapeutics, the prisoner has allowed a child under his charge to die for want of medical attention.

Admittedly the statement has frequently been made that manslaughter is committed when a man, doing an unlawful act not amounting to a felony, by accident kills another,[30] but it is submitted that the unlawful act must be one which may cause bodily harm; Coke's *dictum*[31] to the effect that it would be manslaughter if a man shot at poultry, without intent to steal, and accidentally killed a man, whereas if he intended to steal it would be murder, is well known, but so long ago as 1697 Holt C.J., in *R.* v. *Keate*,[32] said: 'In the case of killing the hen, my Lord Coke is too large, there must be a design of mischief to the person, or to commit a felony, or a great riot.' Even if Holt C.J. was referring to that part of the *dictum* which put the case for murder (which would be strange, for stealing is a felony), the argument may be applied to the other part of the *dictum* also. In *R.* v. *Doherty*,[33] Stephen J. said: 'Manslaughter by negligence occurs when a person is doing anything

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[25] See Russell on Crimes (8th ed.), p. 732, note (*t*) on *R.* v. *Hopley* (1860) 2 F. & F. 201.

[26] Kenny, *op. cit.* p. 123.

[27] *R.* v. *Howlett* (1836) 7 C. & P. 274 (where a tin can was used); *R.* v. *Hazel* (1785) 1 Leach 368.

[28] *R.* v. *Hughes* (1857) 1 Dears. & B. 248; *R.* v. *Benge* (1865) 4 F. & F. 504; *R.* v. *Pittwood* (1902) 19 T. L. R. 37.

[29] [1899] 1 Q. B. 283. There appears to be confusion of Common Law and Statute contained in the judgment of the Court in this case.

[30] Archbold's Criminal Pleading (28th ed.), p. 889; Kenny, *op. cit.* p. 119; Stephen's Dig. Cr. L. (7th ed.), p. 210, art. 294.

[31] 3 Inst. 56.

[32] Comb. 406, at p. 409.

[33] (1887) 16 Cox 306, at p. 309.

dangerous in itself or has charge of anything dangerous in itself, and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence and ought to be punished.'[34] In *R.* v. *Franklin*,[35] where the prisoner had unlawfully taken a box from a refreshment stall on Brighton pier and thrown it into the sea, thereby unintentionally killing a bather, the Court refused to put the case on the basis of the unlawfulness of the prisoner's act in respect of the stallkeeper; and though it must be admitted that the act was discussed as merely a civil wrong, it is arguable that it was a crime also, as the prisoner must surely have intended permanently to deprive the stallkeeper of the box.

The learned editors of Stephen's Digest of Criminal Law[36] adhere to the view that any homicide will be manslaughter if caused by an act which constitutes an actionable wrong, and even by an act contrary to public policy or morality, or injurious to the public; but as the authorities to which they refer for these propositions are, as to the former, all cases of acts involving risk of bodily harm, and as to the latter, all cases of prize fighting, their statements of general principle must be deemed to be subject to the same requirement as is now being suggested, that the result of bodily harm must have been intended or realized, or so probable that it must be deemed to have been realized.[37] It might be put shortly in this way: a man, to be guilty of manslaughter, must have had in his mind the idea of bodily harm to someone, just as the murderer must have had in his the idea of death.[38] Even if the law were otherwise, it can be confidently asserted that no ordinary body of jurymen ever will agree to convict a prisoner of manslaughter or of murder unless they are satisfied that one or other of these ideas respectively must be deemed to have been in his mind.

It is submitted that on an indictment for manslaughter the prosecution must prove, and need prove only,

(1) that the prisoner by unlawful act or omission caused the death of the deceased. (*Actus reus.*)

(2) that the prisoner must be deemed to have intended to cause some bodily harm to someone, or to have been indifferent or reckless as to the obvious risk of bodily

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[34] See also note (*a*) of the edd. on the report of *R.* v. *Horsey* (1862) 3 F. & F. 287.

[35] (1883) 15 Cox 163.

[36] (7th ed.), art. 294.

[37] See also L. Q. R. No. clxxxvi, p. 167, on *R.* v. *Baldessare* [1930] 22 Cr. App. R. 70.

[38] Except, apparently, in such a case as *Director of Public Prosecutions* v. *Beard* [1920] A. C. 479.

harm to which his conduct was exposing someone. (*Mens rea.*)

If this be so, certain difficulties which in some cases the Court apparently, and writers in legal journals admittedly have experienced in applying the law to homicides by motorists disappear. There is now no speed limit for the ordinary passenger vehicle on the ordinary road,[39] but when there was, a driver exceeding it was acting unlawfully[40]; but if in the course of such driving he killed someone he would not have been guilty of manslaughter merely because he was exceeding the speed limit; it would have been necessary to shew that his driving was such as to expose others to the risk of bodily harm in the circumstances of the particular case, and that he must be deemed to have realized this.[41] And the law is exactly the same at the present day. If, therefore, a motorist who has killed a person is charged with manslaughter in one count, and a second count, *on the same facts*, is inserted under the Road Traffic Act, 1930, s. 11, which provides in effect that it is an offence to drive a motor vehicle on a road recklessly, or at a speed, or in a manner dangerous to the public having regard to all the circumstances of the case, it follows that a verdict of guilty on the second should necessarily involve a verdict of guilty on the first count, as was pointed out last year by Branson J. in a case at Derbyshire Assizes, commented on in Law Journal, vol. lxxi, p. 437. The converse is also true; a verdict of not guilty on one count should involve a verdict of not guilty on the other also. In a recent article in a contemporary[42] it was suggested that 'something might be done to stop the present sequence of acquittals in manslaughter cases, if a regular practice were made of adding a count to the indictment of "reckless driving" under section 11, sub-section 1 of the Road Traffic Act.' From what has been said above it is with all courtesy submitted that the addition of such a count should be quite useless.

It follows also that if the prisoner be charged in a further count under section 12 of the same Act, which provides in effect that it is an offence to drive a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, it would be quite possible in law

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39 Road Traffic Act, 1930, First Sched. 1.

40 As at present in the case of vehicles for which the Road Traffic Act (First Sched.) has fixed a speed limit.

41 If, however, it could have been proved that his driving was in the circumstances intrinsically likely to cause death, and that he must be deemed to have realized that possibility, then the crime would have been murder.

42 Law Journal, vol. lxxiv, p. 289.

for him to be found guilty on this last count, and not guilty on the first two counts. For section 12, in referring to 'reasonable consideration,' presupposes conduct which cannot reasonably be said to involve the prospect of bodily harm; while in referring to 'due care and attention' it presupposes the state of mind of the offender to be what, in the present article, is termed *negligence* (*i.e.* inadvertence), which does not amount to *mens rea* at common law, so that a death by it cannot be a case of manslaughter. This will explain a recent case in Cambridge in which a motorist, who had unfortunately killed a cyclist, was found guilty under section 12, but was not thereupon charged with manslaughter. The reason is, that if his offence was no more than one under section 12 he could not properly have been guilty of manslaughter for want of *mens rea*. If an increase in convictions be desired with the law as it is at present, it is respectfully suggested that judges should be careful to avoid even seeming to leave to the jury the question whether the prisoner was guilty of 'culpable' or 'criminal' negligence,[43] but should direct them plainly to decide whether or not the prisoner must be deemed to have realized that his conduct might cause bodily harm to others. Apart from the doubt in which it becomes easy for counsel to involve the minds of a jury when such terms as 'culpable' and 'criminal' negligence are referred to them, it is leaving them to decide a point of law, as 'criminal negligence means no more than the negligence that would amount to a crime, but whether it does or not is still the thing in question.'[44]

By the test of this *dictum* the standard[45] set up by the Court of Criminal Appeal in *R.* v. *Bateman*[46] is open to criticism. It was there said[47]: 'In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, the judges have used many epithets, such as "culpable," "criminal," "gross," "wicked," "clear," "complete." But whatever epithet is used, and whether epithet is used or not, in order to establish criminal liability, the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment.'

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[43] As implied, *e.g.* in Stephen's Dig. Cr. L. (7th ed.), art. 300.
[44] *R.* v. *Elliott* (1889) 16 Cox 710 (Ir.), *per* O'Brien J. at p. 714.
[45] Described as 'the classic definition of manslaughter arising out of negligence' (S. J. vol. 77, p. 54).
[46] (1925) 94 L. J. K. B. 791.
[47] *Per* Lord Hewart C.J. at pp. 793-4.

It will be observed that in this passage the word ' negligence ' is used without any explanation of its meaning. Furthermore, it is not easy to see how it is the function, or within the capacity, of a jury to decide what ' goes beyond a mere matter of compensation between subjects,' or what ' amounts to a crime against the State,' for both these expressions raise points of law, while to advise a jury that ' the negligence amounted to a crime if they are of opinion that it amounted to a crime against the State ' is, it is submitted, more likely to confuse than to help them. Moreover, if the jury think that ' the negligence of the accused . . . showed a disregard for the life of others ' it would appear that their finding to that effect should amount to a verdict of guilty of murder.

If the statement of legal principle advanced in the present article be correct it is difficult to understand the judgment of the Court of Criminal Appeal in the case of *R.* v. *Stringer*[48] which was heard on January 11, 1933. The facts, stated briefly, were that the appellant, S., had driven a lorry round a blind corner without slackening speed, past a warning notice with a red flag, and in spite of signals from two men to stop, so that he came upon a party of men engaged in tarring the road and killed one of them in swerving to avoid a lorry coming in the opposite direction. S. was charged at Gloucester Assizes on an indictment containing two counts (i) of manslaughter, and (ii) of driving contrary to section 11 of the Road Traffic Act, 1930. The judge (MacKinnon J.) adopted the direction to the jury laid down in *R.* v. *Bateman*,[49] and told them he should not attempt to distinguish exactly between the degree of negligence required to justify a conviction on the first count and that required to justify a conviction on the second count. The jury thereupon found S. not guilty of manslaughter, but guilty on the count for dangerous driving. Counsel for S. then submitted, in effect, that the *mens rea* for both offences being identical the jury, if they found him not guilty of one, must acquit him of the other also. The judge overruled this submission and sentenced S. to one month's imprisonment. S. appealed. In the Court of Appeal counsel for the appellant based his case, as he had done in the Court below, on the point of *mens rea*. He submitted that the charge of dangerous driving involved as high a degree of criminal negligence and *mens rea* as manslaughter, and, therefore, an acquittal of manslaughter involved an

[48] T. L. R. vol. 49, p. 190; W. N. Jan. 21, 1933, p. 28; L. J. vol. lxxv, p. 42; (1933) 24 Cr. App. R. 30.
[49] *Supra.*

acquittal of dangerous driving. The Court dismissed the appeal in a judgment which, in the reports so far available, contains no reference whatever to *mens rea*. In delivering this judgment the Lord Chief Justice is reported to have said that with regard to the two counts of the indictment it was to be remembered that each count was a separate indictment, and it was to be observed that on the first count for manslaughter the appellant could not have been convicted of dangerous driving under section 11. In other words, on the charge of manslaughter the appellant was never in jeopardy on the charge under the Road Traffic Act, 1930, and if there had been two separate indictments tried at separate times he could not successfully have put forward a plea of *autrefois acquit*.[50]

With regard to this judgment it may respectfully be objected—

(i) That the appellant's case was based on the point of *mens rea* and not on the point of *autrefois acquit*. It could not for one moment be maintained that the plea of *autrefois acquit* was available to the appellant.

(ii) If each count is a separate indictment a dilemma is presented. For the evidence was given only once and it was given to the same jury. Therefore, either the jury's verdict on the second 'indictment' was given on *no evidence at all* (which surely must be impossible), or it was given on the facts as the jury had already found them to be for the purpose of the first 'indictment,' *i.e.* absence of the necessary *mens rea*. Their verdict on the second 'indictment' therefore can only be good if the *mens rea* required for an offence against section 11 of the Act is different from that required for manslaughter. The Court of Criminal Appeal did not, in the judgment as reported, indicate that there is any difference.

(iii) The Court went on to observe that it was not desirable that a charge under section 11 of the Act should be made in a count in an indictment also charging manslaughter, and that if the two charges were to be made, the proper practice was that they should be made in two separate indictments.

As to this, it may be remarked that in that case the evidence will have to be given a second time, and perhaps before a different jury. If it be the same jury, and no additional or different evidence be adduced, and yet they find a verdict of not guilty at one trial and guilty at the other, the only explanation is that they have exercised the juryman's privilege of

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[50] T. L. R. vol. 49, p. 190.

interpreting the same facts in an entirely inconsistent manner on two occasions. If it be a different jury, the accused must philosophically console himself with the maxim '*quot homines tot sententiae.*' In either case, however, the legal point has not been met.

(iv) The question still remains whether the *mens rea* required for manslaughter *is* the same as the *mens rea* required by section 11 of the Act. In other words, does section 11 require that the accused should have contemplated that his dangerous driving might cause bodily harm to someone? It is submitted that it does require this. The words of the section are: 'If any person drives a motor vehicle on a road recklessly, or at a speed and in a manner which is dangerous to the public . . .' At first sight it would seem that a distinction is drawn between 'reckless' driving and 'dangerous' driving. On the other hand it is arguable that the words 'at a speed or in a manner which is dangerous, etc.' are explanatory of the word 'recklessly.' There is no definition or explanation of this word given elsewhere in the Act. It is hard to see what 'reckless' can mean except 'realizing the possibility of harm to others.' If the latter be the correct interpretation of section 11 the answer to our first question is that there is *no* difference between the *mens rea* required for an offence under section 11 and for manslaughter.

If, however, this interpretation is not correct, dangerous driving must be intended to mean something different from reckless driving. Dangerous must, objectively considered, mean that which may do bodily harm to someone. The difference, therefore, if it do exist, must lie in the subjective mentality of the driver, *i.e.* he must not realize, and must not be deemed to realize, the possibility of such harm. This state of mind is one of pure negligence (inadvertence), *i.e.* an absence of due care and attention. Common Law does not recognize this as sufficient for criminal liability.[51] Statute, of course, can do so.

At this point it is necessary to draw attention to section 12 of the same Act. This latter section deals expressly with driving 'without due care and attention.' Now sections 11 and 12 must be read together, and if section 11 includes driving without due care and attention section 12 would be surplusage. This must be avoided if possible, and it is possible by taking the other interpretation of section 11, namely, that dangerous driving necessitates the ordinary common law degree of *mens rea.* This

[51] Save in the exceptional crime of Public Nuisance (for which, indeed, there can be liability without even negligence).

view is supported by the fact that section 11 contemplates a punishment of imprisonment and not merely of fine, and it is usual, where possible, to interpret statutory crimes which carry imprisonment as requiring the ordinary *mens rea.*

It is submitted, therefore, with very great respect that, in spite of the judgment in *R.* v. *Stringer*, where a motorist who has killed a person [52] is charged in one count with manslaughter, and in a second count, on the same facts, with dangerous driving contrary to section 11 of the Road Traffic Act, 1930, a verdict of not guilty on the first count necessarily involves a verdict of not guilty on the second count also.

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[52] *I.e.* if the homicide (*actus reus*) is proved. If X was driving recklessly, contrary to section 11, and suddenly Y, without warning, darted out from the side into X's wheel, so that even if X had been driving very carefully he could not have avoided Y, then if Y was killed Y *caused his own death*, and X's defence to a charge of manslaughter will be 'no *actus reus*.' X will, however, be guilty of an offence under section 11.

DEPARTMENTAL LEGISLATION.

The Civil Service Point of View.

E. C. S. Wade.

THE Report of the Committee on Ministers' Powers [1] has now been available for more than a year, and the Committee's recommendations as to how far steps should be taken to secure the sovereignty of Parliament and the supremacy of law in the sphere of delegated legislation and judicial or quasi-judicial powers exercised by Ministers of the Crown are well known. The Report has been reviewed and criticized by (*inter alios*) Dr. W. A. Robson,[2] one of the principal witnesses before the Committee, and Mr. W. I. Jennings.[3] Both of these writers are teachers of law, and their observations should be carefully studied.

Less accessible are the two bulky and expensive volumes containing the Memoranda submitted by the Government Departments in the reply to the Committee's Questionnaire [4] and the Minutes of Evidence.[5] The Memoranda supply information to the advanced student of Administrative Law which it has hitherto been impossible to acquire in anything like such detail. Much of the evidence is so valuable that it deserves wider publicity than it is likely to receive if it is to remain buried in the 300 foolscap pages of small print which comprise the Blue Book in question. It is the purpose of this article to draw attention to some of the evidence of leading Civil Servants in relation to the legislative powers exercised by the Departments. Consideration of the even more difficult questions which arise in relation to judicial and quasi-judicial decisions by Ministers must be deferred for another occasion.

Since the principal criticisms of departmental legislation are already well known, we shall confine ourselves to presenting the Civil Service point of view. This is one of the rare occasions

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1 H.M. Stationery Office, Cmd. 4060, 1932, 2s. 6d.; cited below as M. P. R.
2 Political Quarterly, 1932, vol. iii, No. 3, pp. 346 ff.
3 Public Administration, October, 1932, vol. x, No. 4, pp. 333 ff.
4 Committee on Ministers' Powers, vol. i, 1932, H.M.S.O., 15*s*.
5 Vol. ii, £1 10*s*.

on which Civil Servants have had an opportunity of recording their opinions without breaking the tradition of the Service, which forbids giving a direct answer to their critics.

Two of the principal witnesses whose evidence on Departmental legislation we shall consider were the Treasury Solicitor and the First Parliamentary Counsel. Of the Departmental evidence, it will suffice to take that of the Ministry of Health, since that Department is generally recognized as being most concerned with internal government, and particularly with the issue of technical regulations which account for so much of the volume of Departmental legislation. It was the work of this Department in bringing into force the National Insurance Act, 1911, by means of statutory orders which has furnished the precedent for much subsequent legislation.

The Treasury Solicitor emphasized the oft-forgotten truth that every Departmental power has been conferred by Parliament, and that for every official act of his Department the Minister must accept responsibility in Parliament. He then delivered the following emphatic answer to the criticisms which were brought to a head by Lord Hewart in his now well-known essay, which first appeared in a London daily paper in 1929, and was afterwards published in book form under the title of 'The New Despotism.' The Lord Chief Justice was invited to give evidence before the Ministers' Powers Committee, but replied that he had nothing further to add to what he had stated in this book, and thus the Committee were deprived of the advantage of having before them a witness to speak on behalf of the Bench.

Sir Maurice Gwyer's statement[6] was as follows: 'The popular portrait of the Civil Servant, avid of power and unscrupulous in his manner of obtaining it, is to those who know the facts so remote from real life as to be almost laughable. . . . A Civil Servant possessing intellectual power and strength of character will naturally exercise a greater influence than one who does not possess those qualities in the same degree. It may well be that he can and does exercise great influence upon a Minister; but the Minister has always the advantage of the last word. A bureaucracy in the true sense of the word does not, and cannot, exist in England, or indeed under any system of parliamentary government; for, if I recollect rightly, the word is borrowed from Continental systems of the past,

[6] Minutes of Evidence, pp. 2 and 3, para. 5, and see para. 7 as to denial of alleged antagonism between the administrators and the law.

where both Ministers and Civil Service owed a duty to the Monarch alone, and could not be held responsible by any popularly elected body.'

This defence of the Higher Civil Service—the witness was referring in particular to his administrative and legal colleagues—was accepted by the Committee who stressed in the report that the dangers of our administrative system are potential rather than real.

The Committee's Questionnaire requesting information relating to Departmental legislation fell under two heads: (1) Powers to make orders for the removal of difficulties, and to modify Acts of Parliament for that purpose; (2) Powers of delegated legislation with particular reference to those Rules, Orders and Regulations which are to have effect as if enacted in the Act conferring the power, and to those of which the making is to be conclusive evidence that they are properly made.

Powers to make orders for the removal of difficulties have been conferred from time to time by eight modern Acts of Parliament. The device is commonly known as the Henry VIII Clause, so called on account of powers supposed to have been conferred on that Monarch by the Statute of Proclamations, 1539, but it is more than doubtful whether that statute really conferred power to alter the law, and it is difficult to find instances of its operation before its repeal in 1547. The eight Acts in which the clause has figured in recent years have either initiated some far-reaching administrative reform,[7] or have created an entirely new piece of State machinery.[8] The object of the clause is to give the Minister power to adjust the new machinery within limited bounds and for a short period of time. The only power of this description at present in force is that conferred, not on a Minister of the Crown, but on County Councils by the Local Government Act, 1894.[9]

The recommendation of the Committee as to the use of the Henry VIII Clause is that it should only be used in exceptional circumstances, and then (a) for the sole purpose of bringing an Act into operation, and (b) subject to a time limit of one year from the passing of the Act. The Committee accepted the view that the sole purpose of Parliament in including in modern enactments the Henry VIII Clause was to enable minor adjustments to be made. This is of interest in view of the severe

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[7] *E.g.* Local Government Acts, 1888, s. 108; 1894, s. 80; 1929, s. 130; Rating and Valuation Act, 1925, s. 67.

[8] *E.g.* National Insurance Act, 1911, s. 78; Widows', Orphans' and Old Age Contributory Pensions Act, 1925, s. 36.

[9] Section 80.

criticisms directed at the inclusion of this power in the Rating and Valuation Act, 1925, and the Local Government Act, 1929. It is interesting to note that the Committee takes the view that the exigencies of party politics may make the clause a political instrument which must occasionally be used by the practical politician who realizes that the particular measure of reform dear to his heart may stand no chance of passing into law in a subsequent session.[10] The National Insurance Act, 1911, is given as an illustration of the use of the clause as a political instrument.

The Henry VIII Clause confers powers of original legislation. We now turn to the evidence regarding delegated legislation proper. Emphasis is placed upon the confusion caused by the indiscriminate use of the terms 'order,' 'regulation' and 'rule.' On this point the Committee recommend specifically that[11] the expression 'regulation' should be used to describe the instrument by which the power to make substantive law is exercised, and the expression 'rule' to describe the instrument by which the power to make law about procedure is exercised. The expression 'order' should be used to describe the instrument of the exercise of (a) executive power, (b) the power to take judicial and quasi-judicial decisions.

The Treasury Solicitor points out that the great mass of Departmental rules, orders and regulations made under statutory powers are virtually statements of administrative rules which the Departments propose to adopt for the conduct of business entrusted to them by Parliament. They may be legislative in form, but the substance is administrative. For example,[12] an Act may empower the Minister of Transport to approve the type of number plates on motor cars. Whether the approval be given in individual cases or by way of indicating the approved type, the act of approval is administrative. On the other hand the Act may empower the making of regulations with respect to number plates; this is a delegated power of legislation, but the result is the same. The witness contends that the assumption that, when Parliament confers a regulation-making power on a Department, it is necessarily parting with powers which should in the opinion of some be exercised by Parliament itself, is a somewhat rash one. With this contention it is difficult to disagree; the mode of exercise of an administrative act is far more important than the form by which it is made operative, and it is difficult seriously to maintain that decisions of this

[10] M. P. R. p. 61.
[11] M. P. R. p. 64.
[12] Minutes of Evidence, p. 3, para. 12.

kind should be made by the Legislature. In the example given by the witness the organizations concerned with the welfare of the motoring trade and of the public have easy access to the Minister, so have the police, whereas approach to Parliament by such bodies depends upon the presence in the House of private members who may be interested themselves or prepared to submit to the importunities of the outside organizations and to assist them in presenting their case.

The witness defends the practice of the detailed working out of statutes by regulations framed by experts in the Departments, pointing out that the legal profession does not regard itself as derogating from the authority of Parliament when the Rules Committee exercises its exclusive power of making new rules of procedure. On the contrary it assumes that such a Committee is a more competent authority. So it may be with departmental rules drawn by experts and confirmed by a Minister. This example is open to criticism. The Rules of the Supreme Court have been attacked both from within as well as without the legal profession on the ground that they are needlessly complicated just because they have been made by experts. Pressure, mainly from outside, has recently compelled this expert Committee to offer a simpler alternative to the litigant in the form of the so-called New Procedure Rules, 1932.

But further cogent arguments are advanced, particularly on behalf of the Ministry of Health, against transferring regulation-making powers to Parliament or Parliamentary Committees, except so far as scrutiny, as opposed to active participation in the framing of regulations, is concerned. So long as the regulation-making power is entrusted to Ministers, prior consultation with organizations representative of interests affected by the exercise of the power is facilitated. Apprehension is freely expressed lest the transfer of such power to Parliament would effectively prevent the Minister establishing contact and gaining the confidence of bodies which he is now in the habit of taking into consultation before framing regulations. The Ministry of Health states[13] in evidence that 'the matters with which regulations made by that Ministry deal (and the same is no doubt true of other Departments) are almost without exception under the continuous scrutiny of powerful associations and bodies representing local authorities, manufacturing and trading interests, officers of local authorities, and members of the public, whether as owners of property, ratepayers, profes-

[13] Minutes of Evidence, p. 120.

sional men, insured persons and the like. This,' the evidence continues, 'is a point of such fundamental importance in connexion with the consideration of any rule-making system that . . . it may be well to recall to the Committee some of the more prominent bodies with which to a greater or less extent the Department is in communication, formal or informal, in connexion with the exercise of rule-making powers.'

Local Government.—County Councils' Association; Association of Municipal Corporations; Urban and Rural District Councils' Associations; National Association of Local Government Officers; Association of Poor Law Officers.

Public Health, Housing, Town Planning, Model By-laws.—Royal Sanitary Institute; Surveyors' Institution; Royal Institute of British Architects; Housing and Town Planning Association; Town Planning Institute.

National Health Insurance.—Approved Societies' Consultative Council; National Association of Approved Societies; National Association of Insurance Committees; British Medical Association.

There may be added in connexion with regulations relating to foodstuffs the innumerable trade associations. Beneficiaries under the Widows', Orphans' and Old Age Contributory Pensions Acts form the one considerable exception to this rule.

It is obvious that the real and effective scrutiny of departmental regulations lies with representative bodies of this type. A striking instance is afforded by the regulations made in 1925 (operating only in 1927-28) with regard to the use of preservatives in food. Notice of the draft was sent to over sixty associations and individuals. Copies of the draft were also sent to a number of foreign, Dominion and Colonial Governments. Thirty deputations were received by the Department.

It is to be noted that statutory provision for the prior consultation by a Minister of private organizations is nowadays often prescribed as a condition precedent to rule-making. Of late Parliament has even entrusted to a non-political, non-departmental committee (at present consisting of three members only) the sole power of recommending to the Treasury the exemption from, and in the case of some articles the increase of, taxation under the Import Duties Act, 1932. This is one of the most important delegating enactments Parliament has ever passed.

The Ministry of Health is critical of any system by which the final determination of the form and matter of regulations should be reserved to a Parliamentary Committee which would

have to afford direct access to such organizations as have been mentioned above.[14] A system under which every regulation would have to be fought through a Parliamentary Committee would involve not merely a complete reorganization of the Department's staff—in itself not an insuperable objection except on the financial aspect—but would be incompatible with the present procedure of Parliament in relation to public as opposed to private and local legislation. But the most serious objection envisaged by this Department is the changed character in the negotiations with the representative associations. Frank interchange of views, as at present, would give place to a tendency for the parties concerned to play for position and stake out extravagant claims as an opening move in the struggle before the Parliamentary Committee.

This evidence[15] seems to have impressed the Committee. The recommendation for the establishment of a small Standing Committee of each House, so far as regulations are concerned, does not suggest that it would be the function of such Committees to report on the merit of regulations or rules much less to perform the actual task of rule-making.

Returning to the evidence of the Treasury Solicitor, it is interesting to note how in practice Bills which confer regulation-making and similar powers come to be introduced into Parliament and how such powers are in practice exercised. Proposals for legislation fall into three classes—

(1) Bills upon which the Government stake their political existence.

(2) Principal Departmental Bills reflecting Government policy, but not involving major issues.

(3) Non-controversial Bills reflecting Departmental policy on particular points.

The broad outlines of Bills of the first class are settled by Ministers themselves, the other two classes of legislation are mainly the work of the Departments. Final instructions for all Bills go to the Parliamentary Counsel, but no Government Bill is laid before Parliament without the Minister in charge having personally studied and made himself acquainted with every clause, nor is it possible for any official to insert clauses or provisions which the Minister has not formally approved. The Minister has always the deciding voice. Rules, regulations and orders authorized by an Act are drafted usually in the Department concerned by Departmental lawyers, but no regu-

[14] Minutes of Evidence, p. 122, para. 8.
[15] M. P. R. pp. 68 ff.

lation is finally made without the approval of the administrative heads, and none involving questions of policy or likely to give rise to comment in Parliament or in public would fail to be brought to the attention of the Minister himself. No competent Civil Servant would willingly incur the risk of exposing the Minister to Parliamentary criticism by an endeavour to stray beyond the law.

This description is essentially different from the assertions which are made from time to time of Ministers acting as the spokesmen of Civil Servants and sponsors of legislation evolved by bureaucratic guile without proper appreciation of its purport, even on the part of the Minister in charge. It also emphasizes the great value of Parliamentary criticism as a constitutional safeguard.

One of the more obvious grounds for attacking delegated legislation lies in that form of enactment which excludes regulations, rules and orders from the purview of the Courts by providing that they shall be deemed to have been enacted in the Act under the authority of which they were made. The House of Lords in *Institute of Patent Agents* v. *Lockwood* [1894] A. C. 347 held that in the case of a rule of this description, which was capable of annulment by resolution of either House of Parliament within forty days of its being laid before Parliament, the Courts were precluded from inquiring into the validity of such rule, if it was not so annulled. It is well known that rules so laid are seldom actively considered, though this defect will be remedied if the Committee's recommendations are accepted.[16] Apart from this, the scope of the decision in *Lockwood's Case* has been narrowed by the recent case of *Minister of Health* v. *The King* [1931] A. C. 494. The House was here dealing with the application of the *ultra vires* doctrine to a Ministerial order confirming a clearance scheme under the Housing Act, 1925; such an order was not required to be laid before Parliament, but was expressed to have effect as if enacted in the Act. The Court of Appeal[17] held that such an order was *ultra vires* if it departed from the statutory conditions for its promulgation. The House upheld this view, while holding that this particular order was *intra vires*.[18] It is thus now permissible to attack the validity of an order of this description in the Courts, at all events if it is not one which is required to

[16] M. P. R. pp. 68—70.
[17] *The King* v. *Minister of Health, Ex p. Yaffé* [1930] 2 K. B. 98.
[18] Such an order is now subject to an appeal to the Courts under a time limit: Housing Act, 1930, s. 11, sub-s. 3.

be laid before Parliament for confirmation or annulment; in the latter case the Committee's recommendations for a scrutiny by a Parliamentary Committee should provide a fairly ample alternative safeguard.[18a]

The appearance of this type of enactment in a modern statute, the Treasury Solicitor stated, was not to encourage Departments to an excess of zeal, but to remove an element of uncertainty which might otherwise exist if the possibility of challenge existed. The witness expressed his personal opinion that the safeguard was often unnecessary, but regarded it as essential in those cases where the Departments have been entrusted by Parliament with wide powers, the exercise of which may have a continuing effect upon proprietary rights or the status of individuals. For example, the alteration of parish boundaries, which by section 57 of the Local Government Act, 1888, cannot be impeached after six months, must be determined once and for all and must not be subject to attack some years later by a disgruntled ratepayer.

The solution would appear to lie in leaving open an appeal to the Courts strictly limited as to time. Section 11, sub-section 3 of the Housing Act, 1930, is an illustration of this; 'if any person aggrieved by an order [clearance scheme] desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation, make an application for the purpose to the High Court, . . .' It is only on the two grounds mentioned in the sub-section, or either of them, that the validity of an order can be questioned: *Re Bowman, South Shields (Thames Street) Clearance Order, 1931* [1932] 2 K. B. 621. An order cannot be attacked at this late stage on the merits of the scheme which it confirms. The alternative is to return to the practice of requiring *ad hoc* legislation in every case, as was the rule in the case of clearance schemes until the law was deliberately altered by Parliament in 1909.

There is a further category of rules which has been criticized, namely, where the Act declares that the fact of making the rule shall be conclusive proof that it has been properly made and satisfies the requirements of the Act. Usually this provision, which aims at achieving certainty, is superfluous because the rule has been validated by some other provision in the Act

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[18a] As to whether orders requiring to be laid before Parliament can be questioned in the Courts, see [1931] A. C. at pp. 503 and 535; and see below.

itself; *e.g.* by a declaration that it shall have effect as if enacted in the Act. To this there are only one or two exceptions, which are justified by the presumption, the witness suggests, that a great Department of State, or in one case the Rules Committee of the Supreme Court, will perform its duties in the manner prescribed by Parliament. The witness might have added that among merchants a standard of honesty is often assumed regardless of legal precautions, but it is difficult to persuade the average citizen that a Department has much regard for himself. We are inclined to think that this device is chiefly justifiable as a protection against needless litigation at the public expense.

The Treasury Solicitor next deals with possible modifications or alterations in the existing system. The two problems for solution are (1) publicity in relation to administrative action, and (2) the protection of the public against undue exercise of Departmental power. The present practice of consultation with organized interests by the Departments before action is taken does, he claims, secure that due notice is given of any intention of a Department to make new regulations. A widening of the scope of the Rules Publication Act, 1893, is advocated, as well as a limitation of the period for which provisional rules made on the ground of urgency should remain effective. Except in the case of Departmental orders which are in the nature of Private Bill legislation, he sees objections on general principles to approval of draft regulations and orders by Parliament. He regards it as a grave derogation from the principle of ministerial responsibility that Parliament should be asked to approve in advance a great mass of regulations almost wholly of an administrative character. The two main safeguards to protect the public against an undue exercise of Departmental powers should be (1) Parliamentary criticism and (2) the action of the Courts. An address praying for annulment provides a real safeguard in Parliament [19] and the Committee accepts this view, but recommends that exceptional regulations should require an affirmative resolution. The suggestion of challenge in the Courts for a strictly limited time has already been discussed.

This part of the evidence concludes with the observation that the scope of Departmental powers at the present time is not the only subject-matter for investigation, which 'goes far deeper and involves the whole philosophy and technique of modern government. The greater the complexity of our civilization and the wider the range of our legislation, the more

[19] See M. P. R. p. 69.

difficult it is for a popularly elected Legislature to exercise complete control over administrative policy. The utmost under present conditions that it can do in fact is to secure that competent administrators are chosen and to enforce strictly the principle of ministerial responsibility; any fundamental change would imply the adoption of a new theory of government.'

Upon this it may be observed that it is manifestly beyond the capacity of the most competent member of Parliament to comprehend the field of public administration in all its manifold aspects. Parliament, and particularly the House of Commons, is ill suited for the determination of detailed administrative policy. It has shown itself unable to control the day-to-day expenditure of successive Governments. At most Parliament can show its confidence in those whom it chooses to entrust with the direction of general policy. A possible way to alter this would be to shift the responsibility for Departmental action to select committees of Parliament—an inroad on the doctrine of ministerial responsibility. The statutory committees of county councils and other local authorities offer an analogy. It is a commonplace that the effective work of those bodies is accomplished in committee rather than by the council as a whole. But such a change would involve a drastic alteration in the status and composition of the Ministry and tend to sever Ministers from the work of their Departments. It would also add to the already considerable burden of membership of Parliament, which would be compensated by a reduction in the frequency of sittings of the whole House. If administrative matters which are now the responsibility of Ministers became the responsibility of Parliamentary Committees, criticism would no longer involve in the long run, as now, a vote of confidence in the Government; moreover greater publicity would be ensured. It was failure of the attempt to combine government by Committees of the Privy Council with Parliamentary control which led to the development of ministerial responsibility, but a reversion to government by Parliamentary Committees in administrative matters is not to be rejected for historical reasons; such committees would form a link between the Legislature and the Executive such as was not even contemplated in the time of Charles II. So radical a change in constitutional practice is not to be undertaken without full consideration of its effect upon ministerial responsibility; so far as the Civil Service is concerned, one may hazard a surmise that the dependence of the committees controlling Departmental administration would be even greater than the reliance which

an individual Minister necessarily places upon the permanent heads of his Department. Policy, as well as administration, would become their concern to a greater extent than at present. The chief advantage to be derived from the change would be the association of the private member with the actual work of government. Whether this is compatible with party government is debatable, although the parallel from local government points to an affirmative answer.

The evidence given by the First Parliamentary Counsel is more technical and only in one or two respects adds to the description of their powers submitted by the Departments in their Memoranda. The witness points out that much of the field is covered by Dr. C. T. Carr in his little book on Delegated Legislation,[20] reproducing a short series of lectures delivered some years ago in the Cambridge Law School. Dr. Carr is Editor of Statutory Rules and Orders. Attention is drawn to the existence of delegated legislation as early as the fourteenth century. The modern practice of entrusting delegated powers of legislation originated with the Poor Law Act, 1834, and it is to be observed that the Commissioners to whom the powers were given were not, at first, directly responsible to Parliament. It appears from this part of the evidence that in practice the time for drafting Bills is inadequate and the witness agrees with the criticism so often expressed by lawyers that the final form of Bills after passing both Houses of Parliament is unsatisfactory. By contrast statutory rules can be prepared in comparative leisure and their subject-matter arranged in logical and intelligible shape, uncontrolled by the exigencies of Parliamentary procedure. From a Departmental standpoint this is a strong argument in support of the admitted inevitability of delegation; on other grounds, however, it is not convincing. There seems no reason why Public Bills should not be prepared at leisure in most cases, if Ministers were to expedite their decisions to give instructions for drafting, and the arrangement of the subject-matter in logical order should be feasible. Intelligible shape admittedly presents greater difficulties on account of amendments being inserted by Parliament. The remainder of the evidence of this witness consists of a discussion of existing safeguards with suggestions for improvements, particularly in the interests of publicity by amendment of the Rules Publication Act, 1893.

We have already discussed the striking evidence given on

[20] Cambridge University Press, 1921.

behalf of the Ministry of Health regarding prior consultation of interests by that Department as a preliminary to the exercise of its regulation-making powers. In addition the Ministry does not object to the extension of the rule-making procedure laid down by section 1 of the Rules Publication Act, 1893, to cover all this Department's rule-making powers. For a reason which is not clear the old Local Government Board was exempted from the obligation to publish rules under that section. Much emphasis is laid upon the difficulty of distinguishing between administrative and legislative regulations.[21] Evidence is given to show that provision for annulment of regulations by addresses of Parliament to the Crown can in practice be effective, and examples are given of such addresses in connexion with regulations made under five modern Acts; in all such cases but one the annulment was secured. Broadly speaking, this Department's regulations must be laid before Parliament (apart from urgency regulations relating *e.g.* to infectious diseases) and are liable to annulment by this method. Nor does the Ministry see any serious objection to its regulations (as opposed to orders) being left open to challenge in the Courts, though in some cases the indefinite risk of a regulation being held invalid might defeat its object. On the other hand all the evidence under review regards it as essential that orders, such as those relating to the compulsory purchase of land for confirming improvement and reconstruction schemes, should be as final as an Act of Parliament,[22] at all events after a short interval during which objection may be taken in the Courts to the legality, but not the merits, of an order.

An interesting constitutional point is raised by the possibility of allowing the Courts to hold *ultra vires* a regulation which has received the active or passive approval of Parliament. Such a possibility would seem to involve the reversal of the decision in *Lockwood's Case* (above). But such resolutions as actively affirm regulations are not Acts of Parliament, and it is difficult to see why the *ultra vires* rule should not be applied where the affirmed regulation is one which goes outside the Minister's powers of enactment. The supremacy of statute law enacted by Parliament need not involve the infallibility of a regulation merely approved by an affirmative resolution of both Houses, much less of a regulation which has received the negative approval of

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21 See *ante*.

22 Orders for compulsory purchase for other purposes are generally subject to parliamentary approval—at all events if objected to—*i.e.* by Provisional Order Confirmation Acts.

Parliament by lying on the table for the requisite period of, say, forty days without objection being raised.[23]

We have endeavoured to present a summary of the foregoing evidence so that it may serve to bring into proper perspective a problem which is vital to the private citizen living, as he or she does, in a State which in many new directions is imposing its controlling hand year by year. That this part of the evidence impressed the Committee is apparent from the recommendations with regard to delegated legislation.[24] It may be remarked that the composition of the Committee was such that they could not be accused of any bias towards the Civil Service point of view.

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[23] In *Minister of Health* v. *The King* (above) Lord Dunedin, at pp. 502—3, discussing the distinction between that case and *Lockwood's Case*, says: 'I do not think that that distinction, obvious as it is, would avail to prevent the sanction (of Parliament) given being an untouchable sanction"; and see *per* Lord Thankerton, at p. 535.

[24] M. P. R. pp. 64—70.

THE PORTUGUESE BANK NOTE CASE.[1]

M. Tappan Hollond.

IN the three complementary parts into which this book is divided, namely, *The Story*, *The Legal Solutions*, and *The Financial Solution*, Sir Cecil Kisch has set out the several aspects of the famous Portuguese Bank Note Case (*Banco de Portugal* v. *Waterlow & Sons, Ltd.* [1932] A. C. 452)[2] in a way to quicken the mind and gladden the heart of lawyer, economist and dilettante in detection alike. The primary purpose of the book, however, is to put to the test of economic analysis the various views brought out in the course of the case as to the measure of loss to the Bank of Portugal arising from the fraudulent issue of Vasco da Gama notes.

The final judgment of the House of Lords (by a three to two majority) against Messrs. Waterlow and Sons was for £610,392. This figure represents the sterling equivalent at the time of the discovery of the fraud, December, 1925, of the face value in escudos of the illicit notes exchanged prior to December 26, 1925 (£1,092,281); plus printing costs connected with the replacement to the same date of licit notes of Vasco da Gama design (£6,541); and minus the sum recovered subsequently from the liquidation of the Banks of Angola and Metropole (£488,430).

This judgment gives the Bank of Portugal its final claim in full. (1) It acknowledges—as against the decisions of the King's Bench Division and the Court of Appeal—that the Bank could not in the given circumstances reasonably have been expected to distinguish the licit from the illicit notes and to have repudiated the latter prior to the limiting date laid down by the Government of Portugal for the exchange of new for suspect notes. (2) It accepts—following the view of Wright J. and of Greer and Slesser L.JJ.—the 'face' value as against what may be termed, in the expressive phrase of Lord Macmillan, the 'stationery' value basis of the cost to the Bank of replacing the *illicit* by new notes; it adopts as a measure of the face value of these new notes the then current market rate of exchange

[1] *The Portuguese Bank Note Case.* By Sir Cecil H. Kisch, K.C.I.E., C.B. Macmillan & Co. 1932. (10*s.* 6*d.*).

[2] The purely legal aspect of the case is annotated, *post*, p. 103.—Ed.

between escudos and sterling; it disallows the expense of printing these new notes as ordinarily incidental to the Bank's acquiring assets to the face value of its issues; consistently it allows such expense alone in connexion with the replacement of *licit* notes of Vasco da Gama design by new notes, the Bank having presumably received face value for the original licit issues. (3) Finally it regards the question of indemnification of the Bank through subsequent governmental policy as irrelevant to the measure of loss, treating as appropriate deduction therefrom only recoveries directly related to the fraud.

The judgment raises a complex of economic issues which may conveniently be considered in the order in which they arise in connexion with the several aspects of the judgment as above set out.

(1) It was for the proper purpose of preventing a monetary panic that the Bank, with the consent obtained from the Minister of Finance on December 7, offered to exchange outstanding Vasco da Gama notes into notes of indubitably licit character. Although it is a matter of psychology rather than of economics, most practically minded economists would, I believe, agree that, had the Bank, at whatever date it had technically been able to distinguish the Marang notes from its own of similar design, in fact taken the opportunity to repudiate the former prior to the lapse of the official period of its initial offer, a *crise de confiance* would most probably have ensued. Such a step, inflicting widespread loss on innocent holders of the illicit notes, must inevitably have fostered a burning sense of grievance and suspicion of the integrity of the semi-public institution which so took advantage of its technical rights, reversing its declared policy in order to do so. A general 'flight from the currency,' akin to that in Germany in 1922, with all of its untoward social consequences, would have been not at all without the bounds of possibility had not the most effective measures of disinfection been taken against the already present germ of doubt. The decision of the House of Lords in approving the action of the Bank recognizes the pivotal position of a central bank of issue in the structure of financial credit; on this point it would appear not to be open to economic cavil.

(2) The chief questions of economic interest, however, are associated with the series of points in the final judgment concerned with evaluating the loss to the Bank *per* replacement note, as regards those replacing illicit and licit Vasco da Gama issues respectively. Sir Cecil Kisch is guarded in his statements. But the tenor of his argument is clearly opposed both to the adoption

of 'face' value as the measure of loss entailed in replacing the illicit issues (and *a fortiori* the licit issues), and to the use of the sterling equivalent of the notes prevailing at the time of replacement as an index to their face value. His history and analysis of the problems are lucid and absorbing.

That part of his argument which seeks to establish the absence of substantial loss to the Bank at the time of replacement and that part which seeks to maintain the practical indeterminateness of the concept of face value in the absence of duly submitted relevant evidence, are appropriate to the issues under discussion in our present section. That part of his argument, on the other hand, which relates to the mitigation of any loss to the Bank through public policy in the years following 1925, will more naturally call for consideration under section 3.

The fundamental difficulty in any attempt to establish the economic measure of loss in the present case appears to lie in the ambiguity of the term 'loss.' For purposes of the law, the measure of loss in the case of breach of contract is given by the real values of which the injured party would have had the benefit but for the breach; provided that the values are such as the parties could reasonably be expected to have in view at the date of the making of the contract. The deprivation may take the form (A) of a failure of reasonably to be presumed advantages to be realized, or (B) of actual 'out of pocket' sacrifices or commitments thereto. In the majority of cases the measure of A and that of B are not very different; and B is frequently a convenient practical guide to A. But in some cases A and B may differ substantially; in these, since the law recognizes A as the paramount criterion of loss, B cannot be regarded as an appropriate alternative measure of loss.

Sir Cecil Kisch, in maintaining the 'stationery' view of the Bank's loss at the time of the discovery of the fraud, interprets loss in sense B and examines possible sources of loss of this form. The special issue to replace the illicit notes fell outside the ordinary powers of the Bank and therefore necessitated special Government dispensation. The actual dispensation granted to the Bank required neither the shareholders from outside sources, nor the Bank from its profits or reserve, to incur the real costs of acquiring gold or other cover for the notes; in fact it assigned them to a separate account, the liability which they constituted being provisionally balanced on the asset side by the Bank's claim to damages against Messrs. Waterlow & Sons,—a device reminiscent of the French Budget of Recoverable Expenditure in respect of her claims on Germany. Further-

more, Portugal being under an inconvertible paper regime, the Bank was not legally committed to exchange the substituted notes for gold at a permanently, or even temporarily, fixed rate. Thus of the possible losses of B form considered, the only actual loss was the expense of printing the substitute notes.

This reasoning from an economic point of view is certainly sound. But it does not touch the question of possible loss of form A. The Bank's claim, upheld in the final judgment, was that the issue to replace the illicit notes, to which the Bank was compelled by considerations of public duty, lost to it the advantage which an equivalent issue in accordance with its ordinary constitutional powers would have yielded, namely, that of acquiring in exchange for its notes either domestic claims of specified kinds upon the State, or upon individuals, or, alternatively, *valuta*[3]; the value of such claims being indicated by the current domestic price-level or the current quotation for the escudo in the foreign exchange market, respectively.

Sir Cecil objects to this contention on the ground that the Bank offered no evidence that by an equivalent issue within its still ample statutory 'commercial' maximum, it could in fact have attracted to itself claims upon others, domestic or foreign, without altering both the internal and the external value of the escudo adversely, *i.e.* the face value of its notes—and hence the amount of real claims obtainable—below the prevailing levels at home and abroad. The evidence required would have been intricate, and must inevitably have proved inconclusive. It is economically probable, however, that in so far as the Bank might have increased its note issue through the channel of domestic loans or the domestic purchase of Government securities, some part of the new issue would have been used to pay off pre-existing debts to the Bank, leaving it with no net increase in liabilities or corresponding assets, and hence *pro tanto* without effect upon the value of the escudo. On *a priori* grounds it may be argued that the consequence of an 'easy money' policy on the part of a central Bank, other things equal, is inevitably some liquidation of previous credit; and in the present case the general conclusion finds empirical, if indirect, support in the contraction which took place in the Bank's ordinary issues during the period of increase of the illicit notes. Furthermore, assuming the Bank to have employed some part of the hypo-

[3] The further claim by the Bank that notes whilst still in its vault possess such real value was of course rightly denied in the final judgment. It is only through the normal statutory processes of issue that they acquire such value. The term '*valuta*,' borrowed from continental usage, embraces the various recognized kinds of liquid assets in foreign currencies.

thetical issue to acquire *valuta*, the effect on the exchange and consequently upon the amount of such assets obtainable would have depended upon how quietly the Bank went about the business and upon what steps it might have taken to check any competitive demand. Again, the known fact that the perpetrators of the fraud succeeded in acquiring assets abroad by means of the illicit notes, without apparent resulting exchange instability, points to, even if it in no way proves, the Bank's ability to do the same thing. In any event the total of the illicit, and hence of the hypothetical corresponding issue by the Bank, represented only about 6 per cent. of the aggregate outstanding note issue. Supposing the Bank within a short period to have applied the whole of such amount specifically to the purchase of sterling exchange, then, it is true, serious effects upon the sterling value of the escudo must have ensued. But this is obviously an absurd supposition, contrary to the practice of the Bank, which conducted its issue operations more variously. Presuming, as would seem reasonable, that the Bank would have proceeded according to practice, the new note issue on the given relative scale would probably not have altered greatly the sterling value of the escudo. The acceptance in the final judgment of the prevailing sterling equivalent as a measure of the face value of the substitute notes probably does no violence to the result to which economic evidence, had it been submitted, would have been likely to lead. In any case, to suggest that some depreciation of the escudo might have occurred had the Bank attempted an issue corresponding to the illicit issue does not destroy the principle upon which the Bank's claim was based.

Sir Cecil, so far as I can discover, with his eye upon loss of B form, never really rebuts the Bank's substantial claim to loss on A account. The B loss might have been equal to the A loss, and the measure of loss have been taken as either indifferently, if the State at the time had required the Bank upon demand to convert its notes into specie at the current rate, or even merely to acquire balancing (if not directly covering) assets for the substitute notes other than its claims against Messrs. Waterlow. The B loss might also be considered equal to the A loss if the Bank's liability to treat the substitute notes as valid tender for the discharge of debts due to it be recognized, as indeed Lord Macmillan clearly does in his speech. The liability of the Bank to surrender claims, *e.g.* against borrowers, upon due tender of the notes, Sir Cecil appears entirely to ignore as a form of B loss. But whether or not the B loss be maintained

as equal to the A loss is immaterial, since the law declares loss of form A to be the measure of damages. Since any loss of form B, if treated as additional, would involve double counting, the expense of printing the notes replacing the illicit issues disappears if their full asset or 'face' value is allowed. In the case of the notes replacing the licit issues of Vasco da Gama design such expense alone is properly allowable since the advantage forgone was not that of obtaining assets to a corresponding value, but solely that of obtaining them at the original instead of original plus replacement printing cost. The importance of Sir Cecil's analysis lies in shewing that there are some, if to my mind insufficient, grounds for holding that the present case is one in which the B loss diverges from the A loss. The judgment of the House of Lords on the several points here involved, as on the allowance of the full legal period of exchange, would appear to have the balance of economic argument on its side.

(3) There remains the question of the later relief afforded to the Bank through official monetary policy and the liquidation of the ill-founded Bank of Angola and Metropole. Sir Cecil traces the developments following 1925 with a sure touch. The Portuguese Government and the Bank by common agreement adopted the policy of depreciating the escudo by new inflation and, in due course, of stabilizing it on the depreciated basis. By astute measures the technical position of the Bank as regards its statutory maximum 'commercial' issue was legally adjusted profitably to that institution and, in effect if not provably in intention, the way was cleared to secure compensation to the Bank and incidental gains to the State should the judgment of the Courts be adverse. In the light of after events Sir Cecil declares, 'it can hardly be maintained from a financial point of view that the distribution of indemnities has any particular correspondence with the incidence of pecuniary losses.'[4] And in a later passage he says, 'it seems impossible to rebut the contention that the burden of the inflation of 1925, legalized in 1926, has been definitely and finally fixed on the people of Portugal in the reduction of the exchange value of the unit of the Portuguese currency.'[5]

This conclusion as a summary of financial fact is probably not open to dispute. But that subsequent extraneous compensation,—and something more,—was successfully achieved by official monetary policy, and the proceeds shared by the august authorities jointly responsible for it, in no way destroys the

[4] p. 271. [5] p. 278.

Bank's claim for compensation for the loss originally incurred owing to Messrs. Waterlow's breach of contract. For similar measures in the absence of the original loss would obviously have brought a greater net gain to Bank and/or State by the amount required to cover the loss if Messrs. Waterlow had not been adjudged liable. Sir Cecil argues plausibly that the State, in view of the dispensations which it had granted to the Bank and in the event of non-recovery from Messrs. Waterlow, would have been bound to regularize the Bank's account by itself providing an asset against the substitute notes.[6] This it did by Decrees published in June, 1931, and by the implementing contract with the Bank. Thereby part of the book gains accruing to the Bank from the devaluation of the currency was assigned to it as a special reserve fund earmarked to offset the possible failure of the Bank's claim in respect of the fraudulent notes. The balance of such gains the State appropriated, devoting the proceeds to writing off its outstanding debt to the Bank.[7] Clearly either the Bank or the State, according to treaty between them, would be better off if the gains had not so specifically to be earmarked or were free to be used further to reduce the public debt. It is not justifiable to assert, as Sir Cecil does,[8] that because the residue of the State debt was likely to be relatively permanent and carried only nominal interest, 'it is of no real significance to the State whether the figure is E.50 millions more or less.'

The gains accruing from the policy of inflation and devaluation subsequent to 1925, however divided between State and Bank, cannot properly be regarded as compensation for loss arising from the breach of contract since they would have resulted from the given policy, loss or no loss. And had judgment gone against the Bank they would have been so far diminished, and the advantage of the policy would have been so far reduced. There would seem to be no valid economic ground for holding such gains to be an appropriate deduction from the measure of loss suffered by the Bank through the original breach of contract. The only deduction appropriate was that approved (with the previous consent of the Bank) in the final judgment, namely, the value recovered directly in winding up the affairs of the Bank of Angola and Metropole. The fact that the State seized upon the recovered assets and gave the Bank a claim upon itself in their stead is, naturally, a matter entirely between the high contracting parties to the transaction.

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[6] p. 242.
[7] pp. 272—3.
[8] p. 242.

Erratum in Vol. IV, p. 286.—The editorial note to Professor Dicey's article wrongly stated that it was his 'inaugural' lecture. In fact it was his valedictory lecture.—Ed.

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NOTES ON RECENT CASES.

CONFLICT OF LAWS — FOREIGN BILLS OF LADING — EFFECT OF FOREIGN ORDINANCE REQUIRING INCLUSION OF PARTICULAR TERM—OMISSION OF SUCH TERM IN BILLS.

The Torni. [1932] P. 78.

BY the Palestine Carriage of Goods by Sea Ordinance, 1926, The Hague Rules, as laid down by the International Conference on Maritime Law, 1922-23, were made applicable to Palestine. Clause 4 of this Ordinance prescribed that 'Every bill of lading . . . issued in Palestine which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provision of the said Rules as applied by this Ordinance, and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement.'

Certain cases of oranges were shipped at Jaffa for carriage to Hull. The bills of lading, which were unquestionably issued in Palestine and thus within the scope of the Ordinance, did not comply with the Ordinance by containing a statement that they were to have effect subject to The Hague Rules; they did include, however, the following clause: 'This bill of lading wherever signed is to be construed in accordance with English law.' The plaintiffs were Hull fruit merchants, indorsees of the bills of lading, who brought this action against the shipowners, alleging damage to the oranges in breach of the bills of lading. The defendants set up certain exceptions contained in the bills of lading. The plaintiffs contended that the Palestine Ordinance must apply; that, therefore, The Hague Rules, though not expressly incorporated, were necessarily a part of the contract; and that The Hague Rules rendered the exceptions in the bills of lading wholly ineffective.

The present action was solely to determine the preliminary issue, whether the Ordinance must be taken to govern the bills of lading, or whether, as the defendants contended, it was excluded by the clause in the bills providing that they should be construed in accordance with English law.

Langton J. decided for the plaintiffs: [1932] P. 27. The defendants appealed.

The Court of Appeal unanimously affirmed the judgment of Langton J. on this issue. They recognized that it would be an undesirable thing if, as Scrutton L.J. said, it were 'quite simple for every shipowner to defeat the Convention and the whole system under it by simply putting in a clause: "This bill of lading is to be construed by the law, not of the place where it is made, but by the law of the place to which the ship is going"' (at p. 84).

It was not disputed that a contract must in general be subject, as regards its validity and construction, to the law of the country with respect

to which the parties intended to contract. In general no contract, however, which is illegal by the *lex loci contractus* will be enforced by an English Court. Here, it was held, the contract was by the law of Palestine illegal; but, in the words of Greer L.J., there was a 'statutory correction of the illegality' by reason of the final words of clause 4, quoted above. Therefore, just as English Courts would have recognized Palestine law by refusing to enforce the contract if it had been illegal, so here they recognize that law by enforcing the contract subject to the 'statutory correction.' This seems to be the only new proposition of law deducible from the case.

The case of *Re Missouri Steamship Co.* (1889) 42 Ch. D. 321, which was recently applied in *Jones* v. *Oceanic Steam Navigation Co.* [1924] 2 K. B. 730, was strongly relied on by the defence. But it was distinguished by the Court on the ground that in the *Missouri Case* the contract in question was not illegal by the *lex loci contractus*, Massachusetts; it was merely void as contrary to the public policy of Massachusetts. In the present case the contract was not void, but illegal; it offended, not against public policy, but against positive law. Undoubtedly on this ground the present case can be formally distinguished from *Re Missouri Steamship Co.*

J. M.

Constitutional Law — Army — No Duty of the Crown to Afford Military Protection to its Subjects Abroad—Right of the Crown to Demand Payment for such Protection if Afforded.

China Navigation Co. Ltd. v. *Att.-Gen.* [1932] 2 K. B. 197.

The plaintiffs, an English company, were informed by the Crown authorities that the armed guards, which had till that time been provided without payment to protect certain of their ships from internal piracy in China, would in future have to be paid for in full. The plaintiffs accepted this condition under protest and brought an action in which they claimed declarations to the effect that the impositions of the Crown were illegal and unenforceable against them, and that in future, should occasion arise, they would be entitled to protection without payment.

The Court of Appeal, affirming the decision of Rowlatt J., dismissed the action.

Memoranda were placed before the Court to show: (a) on behalf of the Admiralty and War Office that on previous occasions the Crown had received payment for the use of Crown materials and for services of members of the national forces, and (b) on behalf of the Treasury that, under the Public Accounts and Charges Act, 1891, Departments are allowed, instead of paying receipts for services, etc., into the Exchequer, to use them, under the sanction of the annual Appropriation Act, to defray the expenditure of the year so far as they might suffice to meet it.

The plaintiff's case was based on three arguments:—

(i) The Crown has a duty to protect the subject and cannot demand money as a term of the performance of that duty. As to this, it was held that there is no duty to afford legal protection to British subjects in foreign parts. The danger resulted from the voluntary act of the shipowner when he was aware of the risk (Scrutton L.J.). Any such duty

would be wholly unreasonable and without the support of authority (Lawrence L.J.). It was also held that, though the act here done on behalf of the Crown was neither based on a duty enforceable against it nor was void as against public policy, yet it was one which might be obtained with the Crown's consent upon payment of a fee.

(ii) The powers of the Crown with regard to the Army are by law limited, and the common law and statutes which authorize and require the Crown to employ the Army do not allow it to make charges for such use. As to this, it was held that once the standing Army in time of peace is legalized the King may govern and command it as he pleases under the prerogative. In the first place, the preamble to 13 Car. 2, c. 6, which states that the King has the sole supreme government, command and disposition of the militia and of all forces by sea and land, has never been repealed. And, secondly, the plaintiffs were wrong in suggesting that the only force at the time of the passing of the Act was the militia, and in any case the Act is declaratory of prerogative and would apply to any forces thereafter legally raised.

(iii) Even if the Crown can dispose of the Army as it likes, it has no right to levy money to its own use without consent of Parliament. As to this, it was held that the raising of this money is sanctioned by Parliament because the method in which payment must pass through Parliament satisfies this requirement. (See the Act of 1891 cited *supra.*) If it is thought that it does not, then such sanction is necessarily implied from the grant by Parliament of the amount received by the Crown for such hire as part of the supply for the Army. The transaction is made under an admitted prerogative and therefore cannot be questioned by the Courts. Salvage cases show that money is habitually required for services by Crown forces and that such demands have been upheld by the Courts. Sir John Nicholl, in *The Lustre* (1834) 3 Hagg. Adm. 154-5, said: 'It is a mistake to suppose that the public force of the country is to be employed gratuitously in the service of private individuals merely to save them expense.' This case is distinguishable from such cases as *Att.-Gen.* v. *Wilts United Dairies* (1922) 91 L. J. K. B. 897, where there was a duty laid upon some person arising from his office which that person refused to perform unless he received payment. In the case before us there was no duty.

J. R. N. S.

Constitutional Law — Petition of Right — Money Received by the Crown under a Treaty of Peace as Compensation for Injuries Done to British Subjects during the War—Claims by such Subjects against the Crown for Payment of Compensation to Them Held not Maintainable.

Civilian War Claimants Association, Ltd. v. *The King.* [1932] A. C. 14.

By Art. 232 of the Treaty of Versailles Germany engaged to make compensation for all damage done to the persons or property of the civilian population of the Allied and Associated Powers by the aggression of Germany and her allies during the period of belligerency of each State as an Allied Power against Germany.

The Crown received money under this Article. The suppliants were assignees of civilian claimants who had suffered loss or damage by German aggression during the Great War, and they claimed by petition of right compensation out of the moneys paid or payable as reparations under Art. 232. The case made by the petition was that the claimants had duly submitted their claim in accordance with the instructions of H.M. Government to the appropriate Departments, that the claims had been duly verified by the Government, that they were included in the agreed totals of the claims for reparations which Germany was required to pay under the treaty, and that the Crown, by virtue of inviting the claimants to submit their claims, had constituted itself agent or trustee for the claims in respect of money received from Germany on account of reparations. The appellants relied not only upon the above facts, but also upon a certain statement made by the Prime Minister in 1915 that the Government had undertaken to give relief for damage caused to civilians by the raids which had then taken place, and upon a similar statement made shortly afterwards by the Chancellor of the Exchequer with regard to damage done by aircraft.

The House of Lords, affirming the decisions of Roche J. and of the Court of Appeal, held that there was no evidence of appropriation by the Crown of moneys received under the Article for the payment of claimants, and that there was no ground for the contention that the Crown had consented to become trustee or agent for the appellants. They held that the case was concluded by *Rustomjee* v. *The Queen* (1876) 1 Q. B. D. 487; 2 Q. B. D. 69. In that case the British Government by treaty with China received a sum of 3,000,000 dollars on account of debts due to British subjects from Chinese merchants. No appropriation of this money took place, and one of the alleged creditors issued a petition of right making precisely similar allegations, *viz.*, that the Crown was agent or trustee for the creditors. In dismissing the claim, Lush J. pointed out that any distribution of the money received would be, not the act of an agent accounting to a principal, but the act of a Sovereign dispensing justice to its subjects. For any omission of a duty to make such dispensation the Sovereign cannot be held responsible. The responsibility is with the advisers of the Crown and they are responsible to Parliament, and to Parliament alone.

The principle of our case has been applied more recently in the case of *Administrator of German Property* v. *Knoop* (1932) 49 T. L. R. 109. Thus unless the necessary municipal legislation is passed to enforce the provisions of a treaty between States, the private citizen of those States will acquire as a result of the treaty neither rights nor duties.

S. B. R. C.

CONTRACT—BREACH OF IMPLIED TERM—FRAUD OF THIRD PARTY—MEASURE OF DAMAGES.

Banco de Portugal v. *Waterlow & Sons, Ltd.* [1932] A. C. 452.

THIS was an appeal by a Portuguese bank (hereafter called the plaintiffs), having an exclusive licence to issue banknotes as legal tender in Portugal, against the assessment, by the Court of Appeal, of £300,000

as the damages which were due to them from the breach of an implied term in a contract made with the defendants, a firm of printers, who had been employed by the bank to print a series of banknotes of 500 escudos each. 600,000 such notes had been delivered by the defendants in accordance with their contract, and had been put into circulation. Subsequently the defendants innocently, but in breach of their contract, delivered to one M., the head of a band of criminals, 580,000 notes of the same type printed from the original plates. The defendants believed that M. had the authority of the bank. These false notes were introduced into circulation. On discovering the fraud, the bank decided to withdraw the whole issue of 500 escudos notes of this type, and, within a limited time, to exchange all such notes presented to the bank for other notes. All notes issued by the bank were inconvertible. The plaintiffs' claim was for £610,392 for the loss sustained by them in exchanging the spurious notes for good notes of another issue. The defendants contended (1) that the loss suffered by the bank was due to their own voluntary action in paying the unauthorized notes, and (2) that the loss to the bank was limited to the cost of printing and paper in regard to the new issue.

By a majority of three to two, the House of Lords gave judgment for the plaintiffs for £610,392. They held that the assertion (1) above was no defence, as the action of the bank in paying all notes of the defective issue was reasonable and must have been in the contemplation of the parties when making the contract; and that, although the forged notes could have been distinguished after a short interval, there was no obligation on the bank to minimize the damages on behalf of the other party to the contract, if by so doing they would have injured their commercial reputation.

With regard to assertion (2) above, the House differed. Lord Warrington of Clyffe and Lord Russell of Killowen held that the measure of damages should be assessed, not on the principle 'What sum will it cost the defendant to repair his breach?' but on the principle 'What loss has the plaintiff sustained by reason of the breach?' In receiving a note of the defective issue, the bank satisfied its only material obligation by exchanging the spurious notes for currency, that is, for inconvertible notes of like denomination. The obligation of the bank was, in fact, satisfied by taking so many pieces of printed paper from its existing stock or by printing new notes. In either case the loss of the bank was confined to the expense of procuring the necessary paper and of printing the necessary number of notes.

The majority of the House (Viscount Sankey L.C., Lord Atkin and Lord Macmillan) held, that since the notes issued by the bank in exchange for the spurious notes might be used to buy gold or securities, to discount bills or to reduce the amount of a customer's overdraft, the measure of damages should be the market value in sterling of the spurious notes exchanged.

In their writ, the plaintiffs in addition claimed damages for negligence, but this was dropped. On appeal, the sole measure of damages on which the bank insisted was the face value in sterling of every genuine note issued in exchange for a spurious one. As Lord Warrington points out at p. 483, 'they made no attempt to prove that . . . they incurred any other loss or damage, directly or indirectly, as, for example, by the increase in the currency and the consequent depreciation of its

purchasing power, or by injury to their credit or interference in their relations with the Government or otherwise.' Had these points been pressed, the damages awarded against the defendants would have been even greater.

F. H. L.

[See also the leading article on the economic aspect of this case, *ante*, p. 91—Ed.]

Contract — Duty of Owner of Premises to Invitee — Terms to be Implied in Contract with Invitee—Reasonable Care on Invitor's Part Sufficient—Dangerous Sport.

Hall v. *Brooklands Auto Racing Club.* [1933] 1 K. B. 205.

The plaintiff was a spectator at a motor race meeting at Brooklands: he was standing with many other people near the end of the 'finishing straight,' within an iron railing 4 feet 6 inches high. Separating the railing from the track were 4 feet 5 inches of grass and a concrete kerb 6 inches high. During the race two cars, travelling at 103 miles an hour, touched each other at their wheel-hubs. One of them was hurled into the air; it grazed the railings, overturned among the spectators, and injured the plaintiff. He sued (among others) the Brooklands Estates Co., which owned the track and assumed the liability, if any, of its lessee, the real occupier. It was not disputed that this was the first time in the twenty-three years' history of the course that any spectator had been injured by a car leaving the track, or that any car in the 'straight' had gone through the railings.

At the trial the jury, in answer to questions left to them by McCardie J., found that the defendant company omitted reasonable precautions and was guilty of negligence in not exhibiting warning notices, in not increasing barriers, and in not keeping spectators further from the track. The learned judge entered judgment for the plaintiff; the Court of Appeal reversed the decision. They held that the claim was in contract, and that the terms to be implied are for the Court and not for the jury. Scrutton and Greer L.JJ. considered that there were two implied undertakings in this case:

(1) On the part of the occupier who invites spectators. The implied term in respect of dangers of the place (where the leading case is *Francis* v. *Cockrell* (1870) L. R. 5 Q. B. 501) differs from that in respect of dangers of the entertainment on that place. As to dangers arising merely from the place, the defendant must be deemed to have contracted to take due care that the premises shall be reasonably safe for persons using them in the customary manner and with reasonable care. As to dangers arising, not from the place, but from the entertainment, *Cox* v. *Coulson* [1916] 2 K. B. 177 applies, and the obligation is only to use reasonable care to prevent damage from unusual danger of which the invitor knows or ought to know.

(2) On the part of the invitee. 'There is no obligation to protect against a danger incident to the entertainment which any reasonable

spectator foresees and of which he takes the risk' (Scrutton L.J. at p. 217). 'Both parties must have intended that the person paying for his licence to see a cricket match, or a race, takes upon himself the risk of unlikely and improbable accidents, provided there has not been on the part of the occupier a failure to take usual precautions' (Greer L.J. at p. 224).

In effect the two learned Lords Justices held that term (2) afforded a defence, and that in any case there was no evidence upon which the jury could find the defendants liable under (1).

The decision is not particularly satisfactory. The first implied term no doubt rests on good authority, but in upsetting the verdict of the jury the Court seems to have been misled by false analogies. There is, surely, little similarity between the danger which arises from cars which collide at 100 miles an hour, and, for example, the danger of a stray golf ball.

Moreover, it is difficult to see why one should import into the contract a term absolving the racing club from their obligation to take reasonable precautions against cars leaving the track. For, unless the implied term (No. 2, *supra*) signifies such absolution, it neither adds to nor detracts from the rights of the parties under the term deducible from *Cox* v. *Coulson* (*supra*). The term might have some application to cricket or hockey matches, but, once more, that does not mean that it can fairly be applied to modern motor racing.

G. Ll. W.

CONTRACT — MERCHANTS APPOINTED 'SOLE SELLING AGENTS' BY MANUFACTURERS—NATURE OF RELATIONSHIP THUS CREATED—PRINCIPAL AND AGENT OR VENDOR AND PURCHASER.

W. T. Lamb & Sons v. *Goring Brick Co. Ltd.* [1932] 1 K. B. 710.

ON April 21, 1927, a contract was entered into between the defendants, who were manufacturers of bricks and other building materials, and the plaintiffs, who were builders' merchants, whereby the plaintiffs were appointed 'sole selling agents of all bricks and other materials manufactured at their [the defendants'] works.' The agreement was for three years, and thereafter was to be continuous subject to twelve months' notice by either party. Business proceeded according to the agreement until, by a letter dated September 25, 1929, the defendants informed the plaintiffs that they—the defendants—intended henceforth to sell all bricks manufactured by them without the intervention of an agent. Thereafter the defendants sold their bricks directly to customers. Subsequently, twelve months' notice to terminate the contract was given by the defendants. The plaintiffs brought the present action claiming damages for breach of contract.

It was held by Wright J. that the letter of September 25, 1929, was inconsistent with the agreement of April 21, 1927, and that the defendants had broken the contract. He entered judgment for the plaintiffs with damages to be determined subsequently. His decision was affirmed by the Court of Appeal.

It was argued for the defendants that the agreement meant merely

that *if* they sold through any agents, it would be through the plaintiffs, and that this made it lawful for them to sell on their own account if they were so minded. But Wright J. held that it was unreasonable from a commercial as well as from an equitable standpoint to construe the appointment of the plaintiffs as reserving any right to the defendants to sell their manufactures independently of any agent. He followed the decision of Mathew J. in *Snelgrove* v. *Ellringham Colliery Co.* (1881) 45 J. P. 408, in which a partnership firm, having appointed the plaintiff as their sole agent for the sale of their goods within a certain area, and having subsequently solicited orders in that area through one of their partners, were sued and held liable for breach of contract. It was argued in the present case that in *Snelgrove's Case* the partner acted as agent for his firm and that Mathew J. merely denied the right of the defendants to sell through any other *agent* except the plaintiff and not the right of the defendants *themselves* to sell without using any agent at all. Support for this view was found in *dicta* of the Chief Judge in Equity in New South Wales in *Cant* v. *Miller* (1913) 13 N. S. W. S. R. 505, and of McCardie J. in *Bentall* v. *Vicary* [1931] 1 K. B. 253. But, said Wright J. (at p. 714), 'I do not think that, either in *Snelgrove* v. *Ellringham Colliery Co.* or in the present case, the true view ought to be that there was an employment by the defendants of some agent other than the plaintiff. In my view, Mathew J. meant that the effect of appointing the plaintiff sole agent for the sale of the defendants' goods was to put the sole right of selling in the plaintiff.'

In the Court of Appeal, Scrutton L.J. took much the same view as Wright J. had done. But Greer and Slesser L.JJ. considered that neither of the cases cited was relevant, because the relation between defendants and plaintiff was that of vendor and purchaser and not that of principal and agent.

The difficulty in this case centred round the word 'agent.' Its insertion in the original agreement apparently gave rise to the idea that the contractual relationship between the parties was one of agency, but, as was emphasized in both Courts, it was, in fact, a straightforward contract, the word 'agent' being employed in a commercial sense, a point which was stressed by Scrutton L.J. (at p. 717): 'It is well known that in certain trades the word "agent" is often used without any reference to the law of principal and agent. The motor trade offers an obvious example . . . and many difficulties have arisen from this habit of describing a purchaser . . . as an agent.'

P. P. B.

Personal Property—Chose in Action—Assignment of Part of Debt or Legal Chose in Action—Law of Property Act, 1925, s. 136.

Williams v. *Atlantic Assurance Co. Ltd.* [1933] 1 K. B. 81.

The chief point of interest in this case to students is its answer to the question, 'What is the effect of the assignment of part of a debt or legal chose in action?' The note which follows is limited to this point. Remarkably complicated facts can be reduced to the followed epitome:

A owes B a debt of £8,000. B owes C a debt of £7,000. B assigns to C a part of A's debt of £8,000. Is the assignment valid?

Greer L.J. delivered the judgment that is material to this question. He held that such an assignment is not valid within the Law of Property Act, 1925, s. 136. The reason seems to be that given by Bray J. in *Forster* v. *Baker* [1910] 2 K. B. at p. 639. If an assignment of part of a debt were held to be valid within section 136, the splitting of the debt into two or more parts might expose the debtor to a corresponding number of actions by the assignees, and this would greatly increase the burden on him. See, too, *Re Steel Wing Co.* [1921] 1 Ch. 349; *Cotton* v. *Heyl* [1930] 1 Ch. 510. The assignee of part of a debt is merely the equitable assignee in spite of the decision in *Brice* v. *Bannister* (1878) 3 Q. B. D. 569; and unless there be a power to give a discharge an equitable assignee cannot succeed unless he sues in the name of the assignor. In *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* [1905] A. C. 454, equitable assignees were suing without their assignors being joined as plaintiffs. In that case no objection had been taken to this proceeding by the defendants. In the present case such objection had been made by the respondents, and it must be upheld. The action must fail.

G. E. D.

Settled Land—Tenant for Life—Surrender and Grant of New Lease while Underlease Still Subsisting—Meaning of Lease 'taking effect in possession'—Settled Land Act, 1925, s. 42—Law of Property Act, 1925, s. 150.

Re Grosvenor Settled Estates. [1932] 1 Ch. 232.

A tenant for life, having no special powers under the settlement for the purpose, wished to accept a surrender of an existing lease with a view to the grant of a new lease for a fresh term to commence immediately. There was in existence, however, an underlease of the whole premises to a third party. The tenant for life could not, in law, demand surrender of this underlease. The proposed new lease complied with the requirements of section 42, sub-section 1 of the Settled Land Act, 1925, as to form, reserved the best rent, and contained a covenant for its payment and a condition for re-entry on non-payment of rent for twenty-one days.

The only question for the Court was whether, if the underlease were allowed to continue in existence, the proposed new lease could be said to satisfy the requirement of section 42, sub-section 1, that the lease must 'take effect in possession.'

Maugham J. held that, having regard to the effect of section 150, sub-section 1 of the Law of Property Act, 1925, and the previous decision of *Re Ford's Settled Estate* (1869) L. R. 8 Eq. 309, the proposed new lease would 'take effect in possession' within the meaning of section 42, sub-section 1 of the Settled Land Act, 1925, and consequently that the tenant for life had power to carry out such transaction. *Semble*: the definition of possession in section 117 of the Settled Land Act, 1925, extends to section 42.

In the case of an absolute owner circumstances such as the above would

occasion no difficulty. Section 150 of the Law of Property Act, 1925, re-enacting section 6 of the Landlord and Tenant Act, 1730, provides that a lease may be surrendered and a new lease granted despite the existence of a subsisting underlease. The section in effect places the new lessee in the same position as his predecessor so far as regards the sub-term, while the sub-lessee is likewise protected as to his interest, neither the head lessor nor immediate lessor having any greater rights over him or his estate than they or the previous sub-lessor had.

With regard to a limited owner having the powers of a tenant for life under the Settled Land Act, 1925, the position is, however, different. The tenant for life's leasing powers for this purpose are contained in section 42, sub-section 1 of the Settled Land Act, 1925. The section authorizes the grant of leases subject to certain conditions, one of which is that the lease 'shall . . . take effect in possession not later than twelve months after its date. . . .' The point taken in the present case was that a lease could not possibly be said 'to take effect in possession' if the physical possession remained in a sub-lessee whose underlease still continued.

The defining section of the Settled Land Act, 1925, s. 117, which applies unless the context otherwise requires, defines possession to include 'receipt of rents and profits, or the right to receive the same, if any.' The case of *Re Ford's Settled Estate* (1869) L. R. 8 Eq. 309 dealt with a similar case under section 2 of the Settled Estates Act, 1856, which gave to the Court of Chancery power to sanction leases of settled land on terms one of which was that the lease 'shall be made to take effect in possession at or within one year next after the making thereof.' It was decided there that the Court could sanction such a lease even though an underlease continued to exist after the surrender of the head lease and though the physical possession of part of the premises continued in the sub-lessee. In view of the very similar wording in section 42, sub-section 1 of the Settled Land Act, 1925, Maugham J. felt himself bound to follow the principle of *Re Ford* and to hold that such a lease could be granted under section 42.

The case is also worthy of note in showing the great influence that the practice of conveyancers has had in formulating real property law and the desire of judges to uphold principles based on old cases, even if not clearly established, if they have been acted upon to a great extent by subsequent practitioners, and, as a result many documents have been drawn up on the assumption that the decisions are good law.

T. R. W.

TORT—CONVERSION—CONVERSION BY ONE PARTY—JUDGMENT FOR DAMAGES AGAINST THAT PARTY NOT SATISFIED—SUBSEQUENT CONVERSION OF SAME GOODS BY ANOTHER PARTY—UNSATISFIED JUDGMENT AGAINST FIRST PARTY DOES NOT, IN ABSENCE OF SPECIAL CIRCUMSTANCES, DIVEST PROPERTY FROM OWNER OF GOODS.

Ellis v. *John Stenning & Son.* [1932] 2 Ch. 81.

IN 1925 a piece of land was sold to J. N. and M. N. Certain uncut timber was excluded from the sale, the vendors retaining the right to cut and remove this timber before October 11, 1927. In 1926 the plaintiff

purchased the timber and started cutting and carting, but a considerable amount of timber still remained to be removed by October 11, 1927. J. N. and M. N. claimed this timber as their own, and as a result of an action arising out of this claim (*Ellis* v. *Noakes* [1932] 2 Ch. 98 *n.*) it was held that the property remained in the plaintiff and that he was entitled to a certain sum as damages for conversion.

In the meantime J. N. and M. N. purported to sell the timber to the defendants. The plaintiff took no further steps against J. N. and M. N. to get payment of the judgment sum, because he knew that they were wholly unable to discharge it; but on June 10, 1930, he gave notice to the defendants that the sale to them was ineffective and requested the return of the timber. The defendants refused and denied liability.

Luxmoore J. gave judgment for the plaintiff for £240, the agreed amount of the damages for its conversion by the defendants.

The defence set up four points: (i) When the timber was purchased and removed the defendants had no notice of the plaintiff's claim. (ii) The plaintiff knew of the sale by J. N. and M. N. to the defendants and was therefore estopped from bringing this action. (iii) The judgment obtained by the plaintiff against J. N. and M. N. was a bar to the present action because the defendants and J. N. and M. N. were joint tortfeasors. (iv) The judgment obtained against J. N. and M. N. was equivalent to a final election on the part of the plaintiff to recover the value of the timber and to abandon his title to the timber itself.

Luxmoore J., dealing with each of these points, held: (i) If in fact the timber was the property of the plaintiff, any dealing with it so as to deprive him of his property, whether with or without notice of his right, would constitute as against him a conversion of the timber. (ii) There was no evidence to support the suggestion that the plaintiff knew of the sale until after it was completed. (iii) The conversion for which the defendant company was being sued was not the purchase of the timber from J. N. and M. N. but the refusal of the defendants to restore the timber to the plaintiff in compliance with his request of June 10, 1930. This refusal constituted a distinct tort in which J. N. and M. N. had no part. (iv) A judgment in trover, whether it be in the alternative form (*i.e.*, for the value of the property *or* for its return), or whether it be simply for damages for conversion, or for the value of the goods, does not (in the absence of special circumstances), without actual satisfaction, affect the plaintiff's title to the property or his right to sue another for specific restitution or damages in any way, provided always that he does not use his concurrent remedies to obtain a double satisfaction.

Now counsel for the defence did not dispute this with respect to the alternative judgment in trover. What he did deny was the application of the rule to cases in which (as in *Ellis' Case*) the judgment was not in the alternative but was simply for the value of the goods or damages for their conversion; and he argued that, where the alternative order (to restore the goods) was omitted, the plaintiff was divested of his title to the goods. The only authority really in support of this argument was *Bradley & Cohn, Ltd.* v. *Ramsay & Co.* (1912) 106 L. T. 771, but there the facts showed that the goods were regarded as having been sold by the plaintiffs to the person who converted them and the judgment against the latter was for the *price* of the goods, not for their *value* in conversion.

E. A. M. W.

TORT—DEFAMATION—LIBEL—REPORT OF DECISION OF DOMESTIC TRIBUNAL —PRIVILEGE CREATED BY CONSENT OF PLAINTIFF TO PUBLICATION OF DECISION OF TRIBUNAL—EXCESS OF PRIVILEGE.

Chapman v. *Ellesmere.* [1932] 2 K. B. 431.

By rule 17 of the Rules of Racing of the Jockey Club the Stewards of the Jockey Club are empowered to grant, suspend and withdraw trainers' licences; to inquire into, and deal with, any matters relating to racing; to warn any person off Newmarket Heath; and to authorize the publication of their decisions on these matters in *The Racing Calendar*. Chapman, the plaintiff, held such a licence expressly subject to the Rules. A horse trained by him took part in a particular race. The Stewards, as the result of an inquiry into this race, 'satisfied themselves that a drug had been administered to the horse for the purpose of the race in question. They disqualified the horse for this race and for all future races under their Rules and warned Charles Chapman, the trainer of the horse, off Newmarket Heath.' Their decision, which contained the words in inverted commas, was published in *The Racing Calendar* and *The Times*.

The plaintiff brought an action for libel against the Stewards, Messrs. Wetherby, their publishing agents, and The Times Publishing Co., alleging an innuendo that the plaintiff was personally concerned in the doping. Horridge J. held that there was no evidence of malice but that neither occasion was privileged. The jury found that there was an innuendo as alleged and awarded heavy damages against all the defendants. The defendants appealed.

On the plea of privilege for publication in *The Times* the Court unanimously held that racing was not a matter of public interest sufficient to create privilege for newspaper publication. *Allbutt* v. *General Council of Medical Education* (1889) 23 Q. B. D. 400, and *Adam* v. *Ward* [1917] A. C. 309 were distinguished on the grounds of general, as opposed to sectional, interest, and because (in the latter case) the matter had already become one in which public interest had been aroused. Romer L.J. dissented from the *dictum of* Greer L.J. in *Cookson* v. *Harewood* (1929; published as a note to the present case at p. 478), which allowed to the reports of a domestic tribunal the same privilege as the report of a criminal trial. The analogy was misleading, since in the latter case the public had a right to be present.

On the other hand, the jury, in awarding the heaviest damages on the claim least stressed (publication in *The Racing Calendar*), were expressing disapproval of a *bona fide* decision of the Stewards, as if the action were an appeal from that decision to the Court, 'a most unsatisfactory tribunal for dealing with racing matters': Scrutton L.J. in *Cookson* v. *Harewood*, at p. 481. In view of the excessive damages and the confusion of the jury in their findings a new trial was ordered with regard to the publication to the news agencies and in *The Times*.

In respect of the publication in *The Racing Calendar* the appeal was allowed. As Scrutton L.J. had pointed out in *Cookson* v. *Harewood*, the existence of an innuendo is no answer to this defence; the plaintiff had taken that risk.

Lord Hanworth M.R. and Romer L.J. based their judgments on the existence of qualified privilege; upon the immunity, not of this particular communication, but communication in general to *The Racing Calendar*.

The statement published was the decision of an agreed domestic tribunal in the terms reached by that tribunal (p. 450). Slesser L.J. reached the same conclusion by a different route. He held that *volenti non fit iniuria* applied.

Apart from the difficulties of the jury in so technical a branch of the law, the striking feature of the case is the extreme caution with which public interest was defined, in particular the disapproval of Greer L.J.'s *dictum* in *Cookson* v. *Harewood*. Noteworthy, too, is the principle laid down by the Master of the Rolls in answer to the objection that *The Racing Calendar* might be purchased by the general public albeit at a high price. The decisions of any technical or 'specialist' tribunal are open to misinterpretation. The Court must in such cases consider its meaning to those 'who understand the terms and have knowledge of the jurisdiction exercised.'

M. A.

Tort—Husband and Wife—Enticement of Wife—No Defence that Will of Wife was Overborne by Stronger Will of Defendant.

Place v. *Searle*. [1932] 2 K. B. 497.

For five or six years there had been a close friendship between the defendant and the wife of the plaintiff. The plaintiff was aware of it and of their frequent meetings, though not of all. There was no allegation of improper conduct. Finally, a lodger at the plaintiff's house made to the plaintiff a false suggestion of adultery between the wife and the defendant. The plaintiff charged his wife with it and threatened serious harm to her. She summoned the defendant, who, after being challenged to a fight by the plaintiff, and after defeating him, said to the wife: 'Come on Gwen. We will go.' She left the house with him and went to one of her friends. The plaintiff sued the defendant for enticing away his wife.

The claim was founded on the case of *Winsmore* v. *Greenbank* (1745) Willes 577, where it was held that a person who enticed and persuaded away a man's wife violated the husband's right, and the wife's duty, of consortium, and was liable in an action by the husband. The objection that the action was a novel one was overruled.

McCardie J. held that there was no evidence of enticement to go to the jury, and gave judgment for the defendant. On appeal, his decision was reversed and a new trial ordered.

McCardie J. held that *Winsmore* v. *Greenbank* was a reflection of the social position of the wife at the time, when her body and property were within her husband's power. To-day, modifications in the law had freed her person and property; by the Matrimonial Causes Act, 1884, no decree for restitution of conjugal right can be enforced by attachment; *R.* v. *Jackson* [1891] 1 Q. B. 671 had decided that a husband has no right to detain his wife by force. He held that the decision in *Winsmore* v. *Greenbank* must be read in the light of these and other general changes in the wife's position. The action of enticement and the independence of the wife could be reconciled only if the test of enticement suggested

by Darling J. in *Sanderson* v. *Hudson* (Times Newspaper, January 29, 1923) were adopted: was the will of the wife overborne by the stronger will of the defendant so that she was induced to do what she would not have done voluntarily? There was no evidence on which a jury could find that this was the case. At the final scene, the defendant 'merely recognized the obvious fact that it was useless further to oppose the wife's intention to leave her husband,' enraged and dangerous as the latter was (p. 509).

The judgments in the Court of Appeal proceeded on these grounds:

(1) That a husband has a right to the consortium of his wife and a wife to that of her husband, and each has a cause of action against a third party who, without justification, destroys that consortium by enticing or persuading the other away. The law has been altered to this extent, that the means of enforcing the right have been materially weakened. *Winsmore* v. *Greenbank* is not old law. It was followed in *Smith* v. *Kaye* (1904) 20 T. L. R. 261, and *Gray* v. *Gee* (1923) 39 T. L. R. 429.

(2) The test of enticement is: 'Did the defendant wilfully induce the wife to do an unlawful act which, but for his persuasion, she would or might not have committed?' (Slesser L.J. at p. 520). This follows that adopted by Lord Watson in *Allen* v. *Flood* [1898] A. C. 1.

(3) A jury could reasonably find either that the final scene was a climax of years of persuasion and enticement (in which case they would find for the plaintiff), or that the defendant was merely protecting the wife against her husband's violence (which would mean a verdict for the defendant). McCardie J. had erred in concentrating attention on the mere words, 'Come on Gwen. We will go,' and in consequently withdrawing the case from the jury.

(4) The Court of Appeal disapproved *Sanderson* v. *Hudson* (*supra*), and held that the husband need not prove in such an action that the will of the wife was overborne by the stronger will of the defendant.

The case affords a contrast in judicial methods. The legislation which has modified family law leaves the right of consortium at common law unimpaired (Slesser L.J. at p. 521). The question of what constitutes advice or persuasion is one of degree.

E. O. R.

TORT—MASTER AND SERVANT—INJURY TO SERVANT—COMMON EMPLOYMENT—DUTY OF MASTER TO PROVIDE PROPER PLANT—DELEGATION OF DUTY TO COMPETENT PERSONS — MASTER NOT PERSONALLY NEGLIGENT — NEGLIGENCE OF DELEGATE.

Fanton v. *Denville.* [1932] 2 K. B. 309.

THE plaintiff, an actor, was engaged by the defendant to play in one of his touring companies. The defendant did not travel with the company, but was represented by a business manager, a stage manager, and a producer. A play to be produced at Gateshead contained a scene representing the execution of a murderer. The apparatus consisted of a scaffold, and a mattress to break the fall of the body. The defendant had ordered the

omission of the scene, but his representatives decided to include it. The plaintiff was chosen to play the part of the murderer, and was offered a 'double' if he did not like to undertake the drop from the scaffold. The plaintiff decided to take the part, and while rehearsing the scene he was injured. After that a thicker mattress was used, and no further accidents occurred.

The plaintiff sued the defendant, alleging that the defendant or his servant failed in a duty to provide suitable apparatus. The jury found for the plaintiff. Judgment was entered for him. The Court of Appeal reversed this decision.

Scrutton L.J. reviewed the facts and the findings of the jury, and held that the case was to be decided on the following basis: (a) The defendant did not know of the intention to perform the execution scene, or of the provision of improper plant. (b) The defendant had delegated the production of plays to competent persons, one of whom had negligently provided improper plant for the scene.

The plaintiff and the persons to whom the defendant had delegated the production of plays were fellow-servants for that purpose, and the doctrine of common employment prevented the plaintiff recovering against the defendant unless he could show that the defendant was either under an absolute duty to provide proper plant, or was personally negligent. Here there was no personal negligence, so that the main question to be decided was, therefore, whether a master is under an absolute duty to provide proper plant. The Court of Appeal negatived the existence of any such duty, and held that he is merely bound to use reasonable care to see that all plant used in his business is safe, and that he discharges his duty by using reasonable care to choose competent delegates for whose negligence he will not be liable to a fellow-servant under the doctrine of common employment. The Court did not agree with the headnote of *Toronto Power Co.* v. *Paskwan* [1915] A. C. 734, which reads: 'The duty towards an employee to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself, and *cannot be delegated to his servants.*' But, as Scrutton L.J. points out, this seems inconsistent with the judgment in that case, and is in any event contrary to the whole trend of English decisions.

It is settled law that a master may delegate the supervision of work to competent persons: *Young* v. *Hoffman Manufacturing Co.* [1907] 2 K. B. 646, and *Wilson* v. *Merry* (1868) L. R. 1 H. L. 326. And this extends to the provision of proper plant for the work; Scrutton L.J. cited with approval Salmond, *Torts* (7th ed.), p. 130, on this point.

The defendant fulfilled his duty to the plaintiff in delegating the provision of plant to competent persons, and the plaintiff was prevented by the doctrine of common employment from recovering against the defendant for the negligence of such delegate. The Court approved *Laubach* v. *Co-optimists' Entertainment Syndicate* (1926) 43 T. L. R. 30. A master is not bound to warrant the safety of his plant; he must merely use reasonable care to ensure that it is safe.

P. C. C.

TORT—NEGLIGENCE—INJURY TO INFANT—CONTRIBUTORY NEGLIGENCE OF ADULT IN CHARGE OF INFANT — UNSOUNDNESS OF DOCTRINE OF 'IDENTIFICATION' OF INFANT WITH ADULT.

Oliver v. *Birmingham and Midland Motor Omnibus Co., Ltd.*
[1933] 1 K. B. 35.

THE infant plaintiff was crossing a road in the care of his grandfather. In the middle of the road the grandfather, startled by the approach of defendant company's bus, released the infant's hand, and the infant was struck by the bus and injured. The infant sued in the Birmingham County Court by his father, and the jury having found that the company's servant was negligent, and that the infant plaintiff's grandfather was guilty of contributory negligence, it was held that the infant was entitled to recover against the company, notwithstanding the negligence of his grandfather.

On appeal, the Divisional Court affirmed this decision. Counsel for defendants argued that the doctrine of identification laid down in *Thorogood* v. *Bryan* (1849) 8 C. B. 115, survived in *Waite* v. *N. E. R. Co.* (1858), E. B. & E. 719, 728, and applied here. In *Thorogood* v. *Bryan* a passenger in an omnibus, who was injured partly by the negligence of its driver and partly by the negligence of the driver of the defendants' omnibus, was held to be so identified with the driver of the vehicle in which he was riding as to be disentitled to recover. In *Waite* v. *N. E. R. Co.* a child in the care of its grandmother was injured by a train at a crossing owing to the contributory negligence of the grandmother, and it was held that her negligence precluded the infant from recovering. Now, although *Thorogood* v. *Bryan* was overruled in *Mills* v. *Armstrong* (1888) L. R. 13 App. Cas. 1, counsel urged that *Waite* v. *N. E. R. Co.* was distinguished on the ground that plaintiff was an infant and that, although actually decided on contract, it governed the present case.

Swift J. said that whether *Waite* v. *N. E. R. Co.* was authority for the proposition that an infant could not recover because of the contract between the grandmother and the company, or because an infant in arms was identified with the grandmother, was immaterial as the case ought to be regarded as overruled since *Mills* v. *Armstrong*. 'The question, therefore, is whether *Thorogood* v. *Bryan* having been overruled, *Waite* v. *North Eastern Ry. Co.* is still law so as to have this effect, that, while no other person is deprived of his rights against a third party because of the negligence of somebody to whom he has committed the care of himself, an infant of such tender years that it cannot look after itself is deprived of those rights, and that for an infant of tender years the doctrine of identification still continues. In my view there is no ground for drawing any such distinction.'

Macnaghten J. concurred, and pointed out that not only the young, but also the aged, often needed the care of another person. If an accident was due solely to the negligence of that person he could recover compensation; if due solely to the negligence of a third party, he could recover from that third person. It would be odd that if the accident was due to the combined negligence of both he should be without remedy.

E. H. N.

TORT—NEGLIGENCE—LIABILITY OF MANUFACTURER OF ARTICLE TO ULTIMATE CONSUMER—DUTY TO TAKE REASONABLE CARE THAT ARTICLE IS FREE FROM DEFECTS LIKELY TO INJURE CONSUMER'S HEALTH.

M'Alister (or *Donoghue*) v. *Stevenson.* [1932] A. C. 562.

IN this Scottish appeal to the House of Lords the appellant had brought an action for damages against the respondents for injuries caused by consuming part of the contents of a bottle of ginger beer manufactured by them and containing the decomposed remains of a snail. The bottle was sealed with a metal cap by the respondents, and was of dark glass, making it impossible to inspect the contents until they were poured out. A friend had purchased the bottle for the appellant in a café.

By a majority of three to two the House of Lords (Lords Atkin, Thankerton and Macmillan, against the dissent of Lords Buckmaster and Tomlin), held that the manufacturer of an article sold by him to a distributor in circumstances which prevent the distributor or the ultimate consumer from discovering by inspection any defect, owes a duty of care to the ultimate consumer; that in this case there had been a negligent breach of that duty; and that respondents were liable.

It was generally agreed that the English and the Scots law on the matter was the same. Lord Atkin (at pp. 580—582) held that the *dictum* of Brett M.R. in *Heaven* v. *Pender* (1883) 11 Q. B. D. 503, as qualified in *Le Lièvre* v. *Gould* [1893] 1 Q. B. 491, was correct. He stated that, wherever there existed between two persons a relationship so that one of them must realize that if he were not to use due care in his own actions the other would be in danger of injury, then there must be a duty to use such care. This general principle was qualified in the second case by saying that there must exist a certain proximity between the person or goods on the one side and the person or goods on the other. Lord Macmillan (at p. 622) suggests that a good general test is that responsibility ceases when control does. Here, he argued, control had not ceased as the contents of a sealed bottle must reach the ultimate consumer untouched. The contradictory nature of cited cases was due to two rival principles of law. One is the liability for the tort of negligence (which is always dependent on the existence of a legal duty apart from contract); the other is that there can be no liability for breach of contract save where privity exists. But he thought that the same set of facts might found an action for one party in tort, for another in contract (pp. 609—610).

Lord Atkin gave a review of the cases quoted in Lord Buckmaster's dissenting speech. In *Langridge* v. *Levy* (1837) 2 M. & W. 519; (1838) 4 M. & W. 337, the defendant was held liable for injuries to the plaintiff's son. These were caused by a gun, sold by the defendant, which he had falsely asserted to be safe and manufactured by Nock. The case was based on fraud and appears irrelevant. In *Winterbottom* v. *Wright* (1842) 10 M. & W. 119, and *Longmeid* v. *Holliday* (1851) 6 Ex. 761, there was no liability where a defective coach and lamp, respectively, were delivered under a contract of sale or hire and injured a stranger. But in neither case was there any allegation of negligence independently of contract. In *Earl* v. *Lubbock* [1905] 1 K. B. 253, the servant of a party to a contract for the repair of a cart was injured by a defect. The plaintiff lost his case because once again the only duty broken arose from the breach of contract and no duty was shown to the plaintiff. In *Blacker* v. *Lake*

& Elliot, Ltd. (1912) 106 L. T. 533, a defective brazing lamp exploded, injuring a third party. It appears to have been decided from the point of view that there was no evidence of negligence; but Lord Atkin, like other readers of the case, found it difficult to determine what were the precise grounds of the decision (at pp. 592—593).

In *Bates* v. *Batey & Co., Ltd.* [1913] 3 K. B. 351, a defective ginger-beer bottle exploded and no liability was attached to the defendants, although they could, with reasonable care, have discovered the defect. They, however, were not the actual manufacturers of the bottle, but, nevertheless, in accordance with the present case, they should have been held liable for negligence in not detecting the defect.

The only case which appears to support the appellant besides U.S.A. cases is *George* v. *Skivington* (1869) L. R. 5 Ex. 1. Here a chemist sold a hairwash, manufactured by himself, to X, knowing that it was for the use of X's wife. She used it and was injured by it. The chemist was held liable to her.

The great importance of the case lies in the fact that it appears to establish the right to sue in tort on negligence (independently of contract) wherever a duty to the plaintiff has been broken. As long as it is possible to establish between two parties approximate relationship which gives rise to a duty, then, as soon as that duty is negligently broken, the injured party can sue on negligence in tort. The case definitely establishes that the manufacturer of victuals or drugs is liable for negligence to the ultimate consumer, provided no intermediate examination is possible. How much further the principle may be extended is at present doubtful.

B. C. E.

Tort — Negligence — Liability of Manufacturer of Article to Employee of Purchaser—No Liability where Employee Knew of Defect Causing Injury.

Farr v. *Butters Bros. & Co.* [1932] 2 K. B. 606.

The defendants manufactured and sold a crane in parts to some builders, who employed an experienced crane erector to assemble it. In doing so he found some defective cogwheels which he marked with chalk, stating he would report the matter to his employers. He nevertheless began to work the crane, without having remedied the defects, and while he was standing under the jib it fell and killed him. His widow sued the defendants for damages for negligence under the Fatal Accidents Act, 1846. McCardie J. held that there was no case to go to the jury. The Court of Appeal affirmed this decision.

It was argued for the widow that *M'Alister* v. *Stevenson* [1932] A. C. 562 (noted *supra*), which had been decided since McCardie J.'s judgment, covered the case. It was urged that a duty was owed by the manufacturers to those who were to use the crane; that the fact that the deceased knew of the defect was irrelevant, since a visible defect may still be a latent danger; and that the deceased was probably unaware of the extent of the danger that the defect would cause.

The Court of Appeal refused to countenance this argument. It was clearly shown that an essential point in *M'Alister* v. *Stevenson* was the fact that there was no opportunity for examination before consumption, and so no possibility of discovering the defect. In this case, however, not only was intermediate examination possible in assembling the crane, but a defect was actually discovered by the deceased. The contention that he was unaware of the danger to which he exposed himself in working the crane was futile in view of his acknowledged experience. There was therefore no 'proximate' relationship between the parties as there was in *M'Alister* v. *Stevenson*. The case was covered by *Caledonian Railway Co.* v. *Mulholland* [1898] A. C. 216. There, the owners of a wagon let it out to carry goods, knowing it would leave their railway line, and the goods would be discharged by workmen on the line of a second railway company. It was held there was no liability upon the owners of the wagon to such a workman who was injured in using it, since there had been ample opportunity of inspection by the second railway.

The case is interesting as it definitely marks the limits of the decision in *M'Alister* v. *Stevenson*. Manufacturers owe a duty to the ultimate consumer or user only when the defect is latent and there is no reasonable opportunity of intermediate examination before use or consumption.

B. C. E.

TORT — NEGLIGENCE — NO DUTY TO TAKE CARE WHERE POSSIBILITY OF DANGER NOT REASONABLY APPARENT—RESPONSIBILITY FOR ANIMALS—GLASS BROKEN BY DOG LEFT IN CAR—INJURY TO PEDESTRIAN.

Fardon v. *Harcourt-Rivington*. (1932) 48 T. L. R. 215.

THIS case raises no new points of law and contains no discussion of authorities, but it illustrates forcibly the function of the reasonable man in determining what amounts to negligence.

The respondent left his Airedale dog inside his saloon car, parked in a street. This dog, which he had had for over two years, had always been quiet and docile, and was accustomed to being left alone in the car. It became excited, barked and jumped about, and, as the appellant was passing, smashed a glass panel in the back of the car, sending a splinter into his left eye. The eye subsequently had to be removed.

The appellant alleged negligence in an action tried by Talbot J. and a common jury, which found a verdict for him for £2,000. The Court of Appeal reversed the judgment, on the grounds that the dog was not of known mischievous propensities and that there was no evidence of negligence to go before the jury (47 T. L. R. 25), and the House of Lords affirmed this decision.

Scrutton L.J., in the Court of Appeal, and Lord Atkin, in the House of Lords, discussed responsibility for animals. A person keeping a wild animal, such as a tiger, is liable for any damage [*sc.* within the limits of the rules as to remoteness] it may cause. But, apart from negligence, the owners of dogs and horses and other tame and domestic animals are so liable only if they know the particular beast to have mischievous and

vicious propensities. This is clear law, and here the dog was a good-tempered one.

An attempt to enlist the rule in *Rylands* v. *Fletcher* on behalf of the appellant found no favour; nor was a dog in a car considered to be a thing dangerous where the public can have access to it; *e.g.* loaded guns.

Thus the case turned solely on negligence. The respondent undoubtedly owed a duty to the appellant to guard against all such possibilities of harm to a fellow-user of the highway as 'a reasonable man ought to foresee as being within the ordinary range of human experience' (Lord Macmillan). All the judges held without hesitation that this was not such a possibility. Dogs had been left in hundreds of cars and nobody had heard of such an accident before. 'In other words, persons must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities' (Lord Dunedin, at p. 217). There was therefore no evidence to go to the jury.

The case seems to have no wide implications, though it should set at ease any person of more than ordinary prudence who was previously chary of leaving his dog in his car. He may well have argued that though in fact the risk was so slight that he could afford to ignore it, yet he had foreseen the possibility of untoward happenings. And then, upon his own standards, even if the particular form of damage that occurred was especially unlikely, he might be made liable by the rule in the *Polemis Case*. Despite the neat antithesis of Viscount Dunedin (quoted above), he may have felt himself bound to guard even against improbabilities, provided they were, in his estimation, possible.

The jury were obviously influenced by a natural sympathy for the appellant; it was an added misfortune for him, as Lord Dunedin said, that the learned judge did not remove the case from them.

D. B. P.

Tort—Negligence — Quasi-Parental Authority — Alleged Dangerous Game—'Riders and Horses'—Order to Boy to Take Part—Injury —No Evidence of Negligence.

Jones v. *London County Council.* (1932) 48 T. L. R. 577.

The plaintiff, a minor aged seventeen years, was an unemployed person who, under the provisions of the Unemployment Insurance Acts, 1920 and 1930, had been sent from the juvenile department of a labour exchange to undergo a course of compulsory instruction at a county council instruction centre. While there he was ordered by an instructor to take part in an organized game called 'riders and horses,' in which one boy mounted the back of another and endeavoured to bring to the ground the foot of the 'rider' in an opposing pair. During the game the infant plaintiff fell on the wooden floor and was very seriously injured.

The plaintiffs contended that the accident was due to the negligence of the defendants. The defendants pleaded that the injuries were the result of pure accident, and that the particulars of the claim disclosed no cause of action.

The Divisional Court (48 T. L. R. 368) held that, as there was no

evidence of danger and that injury was not to be anticipated, the action failed. The Court of Appeal affirmed this decision.

Scrutton L.J. said that the plaintiff, to be entitled to compensation, must show some breach of a legal duty.

The Minister of Labour had asked the L.C.C. to provide courses of instruction for unemployed youths. The L.C.C. put the matter of physical exercises in the hands of a competent instructor. He had given evidence that he had never in twenty years' experience seen this game, played on a wooden floor, result in a serious accident. Could there have been any negligence? He (the Lord Justice) thought that to say that physical exercises were dangerous because an accident might happen at some time seemed to go beyond what was reasonable.

W. S. McE.

Tort—Negligence—Quasi-Parental Authority—Res Ipsa Loquitur—Schoolboy Hits Golf Ball in Playground—Fellow Scholar Injured—Liability of Headmaster.

Langham v. *Governors of Wellingborough School and Fryer.*
[1932] 101 L. J. K. B. 513.

The plaintiff, a schoolboy, while passing along a corridor between two classrooms during the morning 'break,' was struck by a golf ball, hit by a fellow-pupil in the playground, and consequently lost the sight of one eye.

In an action against the governors and headmaster of the school for negligence the plaintiff said he had never known a golf ball to be struck in the playground before.

Horridge J. at the Northampton Assizes dismissed the governors from the action, but gave judgment against the headmaster for £295 on the ground that negligence on his part might be inferred from the fact that the accident occurred on the school premises. The Court of Appeal reversed this decision so far as it related to the headmaster, and gave judgment for the defendant.

Scrutton L.J. denied the application of the *res ipsa loquitur* rule. That rule was expressed thus in *Scott* v. *London, etc. Docks Co.* (1865) 34 L. J. Ex., at p. 222: 'There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.' It was sought to apply this here by saying that an unusual accident was due to the headmaster's negligence. But in this case there was no evidence that proper supervision was not provided, or that it would have prevented the accident. *Williams* v. *Eady* (1893) 10 T. L. R. 41, where a headmaster was held liable for having left phosphorus where boys could get at it, and one was injured, was distinguishable, because phosphorus is a dangerous thing.

Scrutton L.J. found Lord Dunedin's speech in *Ballard* v. *North British Railway* [1923] S. C. (H. L.) 43 helpful. The noble and learned

Lord pointed out that even where there is an inference of fault upon the defendant, if he can offer an explanation of the cause of the accident, the plaintiff is where he began, *i.e.* he must show negligence.

Greer and Romer L.JJ. gave similar judgments stressing the plaintiff's own evidence that he had never seen a golf ball hit in the playground before. Greer L.J. held that *res ipsa loquitur* did not apply because the facts showed that the accident might just as well have happened without negligence as with negligence.

This case and *Jones* v. *L. C. C.* (noted above) seem to limit the liability of a headmaster or other official for negligence where schoolchildren are injured to cases where the accident was or ought to have been foreseen, and inadequate provision was made against it.

W. S. McE.

TORT — NUISANCE — NO KNOWLEDGE BY PURCHASER OF HOUSE OF PRE-EXISTING DEFECT—RULE IN *Rylands* v. *Fletcher*—NATURAL USER OF LAND.

Wilkins v. *Leighton.* [1932] 2 Ch. 106.

THE plaintiff was owner of a house situate on a steep natural slope. In 1888, when a house, 'Aberdare Hall,' was built, the site was excavated so as to leave a vertical bank thirteen feet high on the east side of the house. To prevent weathering and crumbling of this bank, a wall thirteen feet high and seventy feet long was made. The land on the east side of the house was not built on until 1925, when another house, 'Brown Eaves,' was erected within some three feet of the wall, and was purchased by the defendant in 1926. In 1931 the wall collapsed almost entirely, causing pressure against and damage to the plaintiff's house. Luxmoore J. found that the retaining wall in fact fell owing to the additional thrust on it caused by the weight of 'Brown Eaves'; and that if the foundations of 'Brown Eaves' had been carried down level with the garden of 'Aberdare Hall' no additional strain would have been imposed on the wall.

The plaintiff brought this action for damages for negligence and nuisance (according to one part of the report), for nuisance and trespass (according to Luxmoore J.), and a mandatory injunction. But, whatever the nominal cause of action may have been, Luxmoore J. dealt with it on the following grounds only: (i) the principle of *Rylands* v. *Fletcher* (1866) L. R. 3 H. L. 330; (ii) common law nuisance. On both grounds he gave judgment for the defendant.

With regard to the claim on the first ground, the learned judge followed the decision of the Court of Appeal in *St. Anne's Well Brewery Co. Ltd.* v. *Roberts* (1928) 140 L. T. 1. There the plaintiffs were owners of an ancient inn, one side of which was bounded by the ancient city wall of Exeter, part of which was the property of the defendants. On either side of the fireplace in the kitchen of the inn recesses had at some time unknown been formed by means of excavations made in the wall. A considerable portion of the defendants' wall collapsed and completely demolished the plaintiffs' inn. The plaintiffs, as in the present case, sought to make the defendants liable, both under the doctrine of *Rylands*

v. *Fletcher* and also on the ground of common law nuisance. The Court held that the doctrine of *Rylands* v. *Fletcher* could not apply, on the ground that there had been no abnormal or unnatural use of the defendants' property. Luxmoore J. held the decision in *St. Anne's Well Brewery Co. Ltd.* v. *Roberts* to be 'indistinguishable from the present case.'

This appears to be rather a strong expression to use in this connexion. In that case, it was by no means certain that the damage was due solely to defects in the defendants' wall, which, to a certain extent, may have been weakened by digging operations of the plaintiffs. The finding of the learned judge in *Wilkins* v. *Leighton* that if the foundations of the defendant's house had been properly laid no harm would have resulted (p. 111) brings the case nearer the ambit of the decision of the House of Lords in *Att.-Gen.* v. *Cory Bros.* [1921] 1 A. C. 521 (where there was a finding for the plaintiffs on the ground of negligence, quite apart from the *Rylands* v. *Fletcher* rule) than was the case of *St. Anne's Well Brewery Co. Ltd.* v. *Roberts.* With respect to the rule in *Rylands* v. *Fletcher*, *Wilkins* v. *Leighton* provides a further illustration of the importance of the distinction between 'natural' and 'non-natural' user of land. Sir John Salmond never favoured this distinction; thus he says: 'There are only two decided cases which rest upon its acceptance, and one of them can be explained on other grounds. Such a distinction has little in principle to recommend it': Salmond, *Law of Torts* (7th ed.), p. 347. His editor, however, in his article on 'Dangerous Things and the Non-natural User of Land,' 3 C. L. J. (1929) 376, pp. 389—397, regards the distinction between normal and abnormal user of land as valid, provided it is properly understood. *Wilkins* v. *Leighton* is yet another authority for the view he takes.

The claim based on common law nuisance also failed, as there was no evidence that the defendant knew, or could reasonably have known, that her house constituted a nuisance or hidden danger to the plaintiff's property, or that any such nuisance in fact existed: *St. Anne's Well Brewery* v. *Roberts* (*supra*).

T. M. J

Tort—Public Nuisance—Occupation of Land by Caravan Dwellers under Licence from Landowner — Liability of Landowner for Nuisances Committed on Land Adjoining that of the Landowner by Caravan Dwellers—Rule in *Rylands* v. *Fletcher.*

Att.-Gen. v. *Corke.* [1933] 1 Ch. 89.

This was a case of public nuisance, and it should be noted that one of the remedies for a public nuisance is a civil action brought by the Attorney-General, either on his own initiative or on the relation of some other person.

Here, the Attorney-General, at the relation of the Bromley R. D. C., applied for an injunction against the defendant on the ground that he had licensed a large number of caravan dwellers to live on his disused brickfield on payment of a small weekly rent, and was liable for the many

acts of nuisance committed by them on neighbouring land. The brickfield was only some eleven acres in extent and there had been between 200 and 300 persons living on it. The acts complained of were of two kinds: obnoxious and insanitary operations menacing the health of the neighbourhood, and acts menacing the comfort of the neighbourhood, such as trespasses, disturbances, and damage to adjoining property. All the acts complained of and proved took place, not in the brickfield itself, but in the neighbouring fields and highways. The problem that arose was therefore whether the defendant could be held liable for nuisances committed by his licensees elsewhere than on his land occupied by them.

Bennett J. held that the owner was liable. While it was quite lawful for the defendant to grant licences to caravan dwellers to place their caravans on his land, yet by granting licences on such a large scale the defendant's action had amounted to an abnormal use of the land. Furthermore, it was but reasonable to expect caravan dwellers of the type licensed to commit the nuisances which had been established. The principle underlying the rule in *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330, could therefore be invoked to establish the defendant's liability. An injunction was accordingly granted.

The case raises two matters of interest. In the first place it is an example of the extent to which nuisance and the rule in *Rylands* v. *Fletcher* may overlap (cf. 4 *Cambridge Law Journal*, 194 *seq.*). From the reports it appears that the plaintiffs based their application on nuisance as well as *Rylands* v. *Fletcher*. Yet the decision appears to be based entirely on *Rylands* v. *Fletcher*.

In the second place Bennett J.'s judgment, when applied to Blackburn J.'s well-known statement of the rule in *Rylands* v. *Fletcher* (1866) L. R. 1 Ex. 265, 279, raises the question: 'Is this case merely an illustration of the rule in *Rylands* v. *Fletcher*, or is it a slight extension of it?' The learned judge did not say 'the defendant is liable because the rule in *Rylands* v. *Fletcher* applies' but 'the principle which underlies the decision in *Rylands* v. *Fletcher* affords, in my judgment, a basis upon which the defendant can be made responsible in law for the nuisance' (p. 95), which may be a different matter. Further, in applying Blackburn J.'s statement of the rule, one can scarcely say that this case is one where 'a person for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes,' unless, indeed, we equate dirty persons to 'beasts, water, filth or stenches.' On these facts it would seem we are justified in regarding this case as an extension of the scope of the rule in *Rylands* v. *Fletcher*.

D. W. M.

Tort — Wrongful Issue of Civil Process — Necessity of Proving Malice and Special Damage—Negligence as a Cause of Action.

Corbett v. *Burge, Warren & Ridgeley, Ltd.* (1932) 48 T. L. R. 626.

The plaintiff, a chemist in County Galway, owed the defendants a debt of £3 11s. 4d., which he paid. The defendants, a London firm, overlooking the fact of payment, issued civil process against the plaintiff, who

complained, pointing out that the debt had been paid. The defendants apologized, and promised to communicate with their Irish agents and to drop the proceedings. In fact the proceedings were not dropped, judgment was given against the present plaintiff in default, and the proceedings were reported in the local press, with the result that plaintiff suffered material damage. The decree was subsequently annulled by order of the Irish District Court.

The plaintiff sued for damages. Talbot J. dismissed the action. It is difficult to extract from the report what exactly was the nature of the plaintiff's claim, for there were three (apparently quite unconscious) divergent views about it in: (i) The statement of claim, in which, contrary to an elementary rule of pleading, the plaintiff inserted a good deal of law; on this point it is so confused that one can be sure only of a claim made for negligent breach of duty. (ii) The plaintiff's argument, which proceeded on (a) breach of contract, (b) wrongful neglect to countermand the proceedings in the action, (c) breach of duty so to countermand the proceedings. (iii) The judgment of Talbot J., which proceeded on (a) breach of contract, (b) malicious issue of civil process.

The question for the Court, said Talbot J., was whether a cause of action had been shown: no precedent had been produced for such an action. As to the breach of contract pleaded, in his opinion there was no contract, and if there was, no evidence had been produced of any breach of it. He then went on to deal with the cause of action in tort: 'The cause of action in tort was said to be that the defendants maliciously issued civil process against the plaintiff, but there was no evidence of malice, although there was evidence of carelessness on the part of someone.' Lastly, he held that, even if there had been malice, the damages shown in this case were not within the definition of special damage necessary to support an action of this sort, as stated by Bowen L.J. in *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (1883) 11 Q. B. D. at p. 688.

The learned judge seems to have taken no account of the allegation of negligence and breach of duty in the statement of claim. In fact the plaintiff probably realized before entry upon the action that there was nothing to be hoped for in the first two claims of breach of contract and malicious issue of process. Failing these, an attempt seems to have been made to bring the case within the principle of the tort of negligence by arguing that the facts set up a legal duty which had been broken: see *De Freville* v. *Dill* (1927) 96 L. J. K. B. 1056 and *M'Alister* v. *Stevenson* [1932] A. C. 562. In the latter case (at p. 580) Lord Atkin laid down the principle of liability for negligence in the following words: 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.' Surely this is applicable to the case under consideration. Had Talbot J. sufficiently adverted to that question we might have seen a striking example of the application of the principle laid down by Lord Atkin, and a qualification of the rule laid down by Sir John Salmond (*Law of Torts* (7th ed.), p. 622): 'So long as legal process is honestly used for its proper purpose, mere negligence or want of sound judgment in the use of it creates no liability.' As the

decision stands, however, the case adds one more to the instances of *damnum sine iniuria*, to be explained away by the champions of the expansive theory of the law of tort as best they may.

J. W. C.

VENDOR AND PURCHASER—LESSOR AND LESSEE—DANGEROUS CONDITION OF HEREDITAMENT OR TENEMENT—INJURY TO PURCHASER OR TENANT—NO LIABILITY AT COMMON LAW (APART FROM EXPRESS CONTRACT) ON PART OF VENDOR OR LANDLORD FOR SUCH INJURY.

Bottomley v. *Bannister*. [1932] 1 K. B. 458.

A FIRM of builders contracted to sell to Mr. Bottomley one of the houses on their estate. They agreed to complete the house by October 30, 1929, making it uniform with the other houses on the estate and fit for habitation. The house, like the others on the estate, was fitted with a particular make of boiler, heated by a Bunsen gas burner. From a cupboard in the bathroom a linen chute ran down to a cupboard in the kitchen connected with the boiler by a pipe. A clause in the contract enabled Bottomley to take possession as tenant at will of the house before completion of the purchase; and before that date Bottomley, with his wife and child, moved in on September 28. The gas fittings were examined by the gas inspector, who set the regulator fitted to the burner so that forty-five feet of gas, and no more, passed into the burner per hour. On October 26, Mr. and Mrs. Bottomley were found dead in the bathroom, poisoned by carbon monoxide gas. A few days later the regulator was found to be set so as to admit much more than forty-five feet of gas per hour. Regulating the gas supply was the duty of the gas company. The administrators of the deceased sued the builders in tort under the Fatal Accidents Act, 1846.

The Court of Appeal reversed the decision of Hawke J., sitting with a jury, and held that the plaintiffs could not recover.

Hawke J. had asked the jury whether the boiler was dangerous for use, and, if so, whether the defendants knew or ought to have known that it was dangerous. The jury found that it was dangerous, and that the defendants ought to have known that it was. The plaintiffs' case was based on (1) such cases as *Parry* v. *Smith* (1879) 4 C. P. D. 325, *Dominion Natural Gas Co.* v. *Collins* [1909] A. C. 640, *Heaven* v. *Pender* (1883) 11 Q. B. D. 503, which establish a contractor's general liability to persons with whom he has no contract for work done negligently on another person's premises; and (2) cases which establish the liability of the vendor of a dangerous chattel who gives no warning to the purchaser which might be passed on to the user of the chattel. The Court of Appeal criticized these arguments on the following grounds:—

(1) The question of inherent danger is one for the judge, not for the jury, to whom it had been left by Hawke J.

(2) Even if the boiler was dangerous (which was not the opinion of the Court of Appeal), some person, probably one of the deceased, had, by tampering with the regulator after it had been properly set, constituted a *nova causa interveniens*, absolving the defendants from liability.

(3) In any case the apparatus was part of the realty, and therefore the cases dealing with dangerous chattels were irrelevant. Greer L.J. said (at pp. 477—478): 'After *Cavalier* v. *Pope* ([1906] A. C. 428) in the House of Lords, and *Lane* v. *Cox* ([1897] 1 Q. B. 415), I cannot hold that these decisions apply to cases between landlord and tenant, or to cases between the landlord and persons using the premises by licence of the landlord.' The cases named establish the rule that, fraud apart, there is no duty on a landlord not to let a house in a dangerous or dilapidated condition; and the Court of Appeal here held that a vendor is in the same position as a landlord. Thus the only ground on which the defendants could possibly be found liable was negligence, and 'before you can establish liability for negligence you must first show that the law recognizes some duty towards the person who puts forward the claim': *per* Greer L.J. at p. 476. Apart from the contract, when they installed the boiler, the builders owed no personal duty to the deceased.

The plaintiffs could not sue on the agreement to render the house habitable, for there was no evidence that the house, with the needle of the boiler properly adjusted, was not habitable; in fact, it had been properly adjusted.

This case suggests an opportunity for useful law reform. The extent of liability for dangerous chattels is uncertain (cf. Salmond, *Law of Torts* (7th ed.), pp. 478—488); for dangerous realty on the facts in the case before us there is no liability. Both Scrutton and Greer L.JJ. hinted at the advisability of considering a change in the law (at pp. 469, 478).

K. J. T. E.

BOOK REVIEWS.

A Text-book of Roman Law from Augustus to Justinian. By W. W. Buckland, LL.D., F.B.A. Second edition. Cambridge: At the University Press. 1932. xvi and 763 pp. (£1 16*s*.)

It indicates a healthy interest in Roman law that a second edition of such a work as Dr. Buckland's 'Text-book' should be required after eleven years. Thanks as well as congratulations are due both to the author and to the Syndics of the University Press; for the book was not one which clamoured for re-edition. It was a work of maturity; it sprang fully armed from the brain of Jove. Its purpose, to present Roman law as the Romans saw it, was very definitely conceived, and was pursued with rare consistency and competence. Whatever minor blemishes (chiefly a few omissions of literature, inevitable in the period immediately after the war) the critics, especially the author, may have discovered, there was no fundamental change to be made, and the book could have stood unchallenged in English Romanistic literature for many years. The history of Roman law up to Justinian is one thing; its history from the rise of the Bolognese school onwards is another, and there is no scientific justification for confusing them. This is more obvious to-day than it was some ten years ago, when certain criticisms were uttered which would hardly be repeated now. At the more remote date when Dr. Buckland began to write his book, he was a pioneer and a prophet. Of course it does not follow that the aspect of Roman law with which he deals is the only one deserving our attention, but it suffices for one book. Dr. Buckland adheres to it with an austerity which occasionally one cannot applaud wholeheartedly, as where (pp. 428—9) he demolishes *causa* in the Roman theory of contract without a reference to H. Capitant's 'De la Cause des Obligations' (Paris, 1923), which would have drawn attention to the later and modern importance of the conception.

Externally there is little change in this second edition; it is somewhat longer, for, though the number of pages has hardly grown, the printing is closer and the verbiage has been severely pruned. A welcome improvement is the insertion of the section number at the top of each page, but it is a pity that Roman numerals have been kept.

Internally there has been no fundamental revision, but alterations of detail are numerous. Dr. Buckland, p. xi, n. 1, has made it unnecessary for a reviewer to chronicle the more extensive of them, but there are many others. The not very important omissions of literature in the first edition have been made good, and later literature has been adequately noted up, without that piling up of undigested references which disfigures so many second editions. In this matter, indeed, *les silences du Professeur Buckland* are at times eloquent; perhaps he has carried them a little far in his account of the interpolation question (pp. 42 ff.), brilliantly re-written as it is. Having taken the new edition into constant use for

some months now, from the moment of its appearance, I can testify that it deserves the success of the first, and I can think of no more appropriate praise. The very few criticisms which I could make are probably disputable and in any case not important.

The literary activity of modern Romanists is such that one is apt to regard the date of the publication of any comprehensive work as unfortunate, but looking at the matter in proper perspective I see no special ground for regret in the present case. If I mention by way of footnote some notable subsequent studies, it is because of the importance of Dr. Buckland's great work in the English-speaking academic world. At p. 91, n. 13, E. Levy, *Zur Infamie im röm, Strafrecht, Studi Riccobono,* ii, 79 ff. (Palermo, 1932); at p. 197, W. Kunkel, *Civilis u. naturalis Possessio, Symbolae Friburgenses in honorem Ottonis Lenel,* 40 ff. (Leipzig, 1932); at p. 228, articles by J. Hupka and F. Schulz in *Z. S. S.* lii (1932), 1 ff., 535 ff., and another by E. Schönbauer in *Krit. Vierteljahresschrift,* xxv (1931-2), 136 ff., all on *iusta causa traditionis*; at p. 230, n. 8, a criticism of F. Pringsheim's doctrine by E. Schönbauer in *Z. S. S.* lii (1932), 195 ff.; at p. 286, M. David, on the forms of wills in the later Empire, in *Z. S. S.* lii (1932), 314 ff.; and lastly the account of the libellary procedure would clearly have gained if P. Collinet's *La Procedure par Libelle* (Paris, 1932) could have been used.

F. Z.

Historical Introduction to the Study of Roman Law. By H. F. Jolowicz, M.A., LL.M., of the Inner Temple, Barrister-at-Law; Professor of Roman Law in the University of London. Cambridge: at the University Press. 1932. xxi and 545 pp. (21*s.* net.)

It was a happy coincidence that the Cambridge Press should bring out at the same time Professor Jolowicz's 'Historical Introduction' and the second edition of Professor Buckland's 'Textbook.' There is evidently a demand for serious English books on Roman Law, and these two books are together well qualified to supply it. The general character of the 'Text-book' must by now be familiar to all who have gone beyond the rudiments of the subject. They will therefore understand Professor Jolowicz when he writes in his Preface: 'The central subject of Roman legal studies must remain the private law of classical and later times, but an historical background has always been necessary, and is even more so now that the new problems discussed by modern authors are mainly of an historical rather than a dogmatic nature. My object has therefore been to supplement Professor Buckland's *Text-book* and *Manual* from this point of view, and to give the student what he needs to know about Roman law rather than the Roman law itself.' The 'Text-book' is 'of Roman law from Augustus to Justinian,' so the 'Introduction' gives 327 pages to the Republic. The 'Text-book' is occupied with Private Law, the sources receiving only a chapter; so the 'Introduction' dismisses the Private Law of the Empire in two chapters, and devotes thirteen to the

history of the sources. The only considerable overlap is that both books discuss at some length the three successive systems of legal procedure; and this is amply justified by the great influence of procedure on substantive law in the Roman, as in every elastic and growing, legal system. It is impossible to understand the Roman technique of juristic law-making without a knowledge of *actiones utiles* and *in factum*; and it will take many books to persuade people that the 'fiction' of a *formula ficticia* is not a rude device like the casual ejector and the triple sale of a *filiusfamilias*, but an extremely delicate and subtle instrument of gradual and tentative but conscious and avowed adaptation of law to life.

Professor Jolowicz describes his book as a version of *Hamlet* without the Prince of Denmark. One might expect that a book on Roman Law which left out nearly everything the 'Text-book' puts in would be like Equity without Common Law—'a collection of appendixes between which there is no very close connexion.' But that danger has been successfully avoided. The effect is more like that of the new University Library in its present state. The foundations are there—the Law of the Republic; and two great wings, rising to their full height—the legislative and judicial processes of the Empire. The great central tower of the classical private law is missing, and the gap is conspicuous. But although foundations and wings need the tower to give them significance, they can stand without it. This Introduction will mean most to those who have a good knowledge of classical law, but it will be intelligible to those who have none.

It is a pity that the History of Roman Law has lately been dropped from the Tripos, since the scale of the book makes it more suitable for second than first year men. The private law of the Republic is within the syllabus, but questions on it are comparatively rare, and it seems that only the four chapters on procedure and the two chapters on the general character of the Classical and Post-Classical Law can be regarded as worth their weight in marks. For the Qualifying Examination, on the other hand, the History of the Sources is essential, and all teachers must be glad to have so clear, so authoritative, and so interesting an account of it. One warning may be given: chapter two is, in the reviewer's opinion, dull; but that is because the Republican Constitution is, for some quite obscure reason, an intrinsically dull subject, not to be enlivened even by Mr. Heitland. Probably many freshmen will give the book up after forty or fifty pages, but they will make a mistake; there is no other chapter of comparable dryness. Not all can be expected to read the whole book; the private law of the Republic and the constitutional law of the later Empire are treated with a fulness suitable only for first class men; but it may reasonably be hoped that nearly all candidates for the Qualifying Examination will read at least chapters 1, 2, 5—7, 12, 13, 19, 21 and 22, and many a good deal more. The reviewer's experience, so far as it goes, has been that undergraduates, once they have got over the shock of meeting a book so bulky and so heavy in the hand, find it comparatively easy reading, and their appetite grows by what it feeds on.

But this Introduction is more than its name implies; it is no doubt intended mainly for students, but there can be few, if any, teachers who will not find much in it that is new and instructive. Professor Jolowicz has all the learning of the continent at his finger-tips, and is not afraid to venture a hypothesis of his own. We shall never know more than a

very little about the law of the Republic; the evidence is fragmentary; but Professor Jolowicz neither shirks the duty of reaching conclusions, nor presents his conclusions as established dogmas. Perhaps he is a little apt to forget the inevitability of gradualness; it is hard to believe that the Decemviri put into the Twelve Tables everything that Gaius or even Cicero found there, or that Gaius' form of words for *familias mancipatio* was forged *uno ictu*; but these assumptions certainly simplify discussions that are complicated enough as it is for most people's taste.

P. W. D.

The Law of Bankers' Commercial Credits. By H. C. Gutteridge, M.A., LL.D., of the Middle and Inner Temples, one of His Majesty's Counsel, Fellow of Trinity Hall and Reader in Comparative Law in the University of Cambridge, formerly Cassel Professor of Commercial Law in the University of London. London: Sweet & Maxwell, Ltd. 1932. xvi and 124 pp. (10*s.* net.)

Dr. Gutteridge has made a notable contribution to legal literature. His treatise is, moreover, the first in which an important British commercial device has been considered from a legal point of view. Exploring a little-known tract of law, he has now reduced to order the rules and principles applied by the Courts to the practice of financing the exportation and importation of goods by means of bankers' commercial credits. Not only are the legal materials concerning these credits scattered throughout the various series of English law reports, but the law which they embody is closely related at many points to other parts of our commercial law, especially those dealing with negotiable instruments and C.I.F. and F.O.B. contracts of sale. It is indeed fortunate that a master of commercial and comparative law has chosen to write upon this ill-defined part of our system of commercial law. Owing to his wide experience as practitioner and teacher, he has not been content to study the cases individually with the sole object of understanding their *ratio decidendi*, for, with skill and learning, he has brought all the cases into a connected whole. By so doing he has marked out the boundaries of the law of bankers' commercial credits, and, under his care, this branch of our system now stands out in sharp perspective, so that its relations to other branches may be clearly perceived.

The subject-matter of Dr. Gutteridge's treatise is an excellent illustration of the fact that the practices of commercial life anticipate their legal regulation, and, moreover, even when the Courts, through litigation, have slowly legalized the practices of the commercial community, those practices are still of fundamental importance to the lawyer, for they are in fact the law in action. Dr. Gutteridge has, therefore, wisely begun his treatise by a study of the mechanism of bankers' commercial credits and by a definition and explanation of the various types of such credits. With these practical matters clearly in mind, the reader more easily grasps the significance of the legal matters which follow. In successive chapters Dr. Gutteridge deals with the legal aspects of the contract

created by the issue of a banker's commercial credit and the contractual relationships arising under such a credit, and, moreover, he then considers the tender of documents under a banker's credit, the banker's security for his advances, and the measure of damages for breach of the banker's undertaking. At the end of the book the reader will find a note on conflict of laws and a valuable collection of modern forms used in connexion with commercial credits.

Although the temptation to enlarge upon some of the matters embraced in this interesting treatise must be resisted, attention may be drawn to two or three topics. Thus, in dealing with the nature of the legal relationship created by these transactions, which is in dispute, Dr. Gutteridge considers three theories, namely, those of offer and acceptance, guarantee, and estoppel or trustee. One special difficulty incident to the problem of defining the nature of the contract has been the supposed absence of consideration for the banker's undertaking. Dr. Gutteridge deals with this question, which is still an open one, since the English Courts have never decided it in terms, and he reaches a conclusion in favour of the presence of consideration. 'If the view be taken,' he says, 'that the buyer is the seller's agent to make a contract with the banker, it is submitted that there is ample consideration for the banker's promise to pay. The seller's undertaking to deliver the documents of title to the banker would appear to be sufficient for that purpose' (p. 27). Again, in dealing with the banker's security for his advances, Dr. Gutteridge has presented us with some very valuable pages on the 'letter of hypothecation' ('letter of lien,' 'letter of trust'), and he has reached the conclusion that 'the letter of hypothecation has come to stay as one of the recognized instruments of commerce and that its validity in law is well established' (p. 82). It is also of some interest to observe that in Dr. Gutteridge's view the rule in *Ex p. Waring* is applicable to the case of a banker's commercial credit (pp. 85—86).

There is no doubt that this illuminating treatise, written in a legal style of marked lucidity and force, will be of great usefulness to practitioners, judges, merchants, bankers, economists, and teachers of law. They will all welcome the appearance of a book on commercial law by a legal scholar who is at the same time thoroughly familiar with the practice of commercial Courts at home and abroad.

H. D. H.

The Elementary Principles of the Law of Bankruptcy and Deeds of Arrangement. By Harold Potter, Reader in English Law in the University of London, King's College, Terence Adams, of the Middle Temple, Barrister-at-Law, and Augustus W. Dickson, Solicitor of the Supreme Court. London: Butterworth & Co. 1932. lv and 339 and 41 pp. (Index). (12*s.* 6*d.* net.)

The Introduction to this new book on the law of bankruptcy contains, *inter alia*, a short, but interesting, historical survey of bankruptcy legislation (pp. 1—15). While in general the main topics of the law are

arranged in the order usually adopted by writers, the placing of deeds of arrangement at the beginning of the book is a welcome departure (pp. 17—33). The main object of the learned authors has been to write a student's book, containing only what is most essential, wherein the fundamental principles, and not less the reasons upon which they depend, are stated; and in the execution of this purpose they have not only drawn upon decided cases and extracts from judgments in illustration of principles, but have further facilitated the labour of the student by employing different types for the several classes of subject-matter contained in the book (pp. v—vi).

There is no doubt that as a brief summary of elementary principles the work will prove to be useful for students; and to teachers also it will be helpful as a fresh treatment of the subject from the academic point of view, with considerable attention paid as well to the application of principles in practice. Although the authors mention a 'lack of brevity' in their exposition (p. vi), this can hardly be regarded as a characteristic of all parts of the book. Indeed, some statements are so brief as to result in lack of clarity; and on occasion there is no reference to certain of the leading cases. Thus, for example, in dealing with the subject of mutual credits (pp. 258—264), the authors make no mention of *Rose* v. *Hart*, 8 Taunt. 499, a leading case which considerably narrowed the interpretation placed upon the meaning of 'mutual credit' (Williams' Law and Practice in Bankruptcy, 14th ed., 1932, pp. 174—5). Knowledge of a case like that would have been illuminating to the student.

In some places, moreover, the book suffers from the absence of a lucid and methodical arrangement of the points involved in a given rule or a given principle. Of this the account of the Rule in *Ex p. Waring* (1815) 19 Ves. 345, may be taken as an illustration (pp. 166—168). The remarks of Cotton L.J., in *Ex p. Dever*, 14 Q. B. D. 611, at p. 623, which the authors quote (p. 166), can hardly be regarded as taking the place of a statement of the Rule by themselves. Cotton L.J., in the quotation cited, did not in fact state the Rule, but 'the principle of the rule,' and he implied a knowledge of the Rule itself. The beginner, puzzled by the authors' account, wherein there is no statement of the Rule, is not prepared for the authors' statement as to the application of the Rule (p. 167). The authors' treatment of 'reputed ownership' (pp. 187—200) may be mentioned in further illustration of the point that they do not always elaborate subject-matter with adequate clearness. There is no definition of reputed ownership; and, moreover, the text of the Bankruptcy Act, 1914, s. 38 (c), and the quotation from a judgment by Vaughan Williams J. (pp. 187—8), even when somewhat elucidated by an extract from a judgment by Selborne L.C. (p. 194), cannot properly be regarded as a substitute for a definition. There is, again, no definite statement as to when the doctrine applies; and, furthermore, the important distinction between two classes of choses in action, which is drawn by the proviso in the Bankruptcy Act, s. 38 (c), has scarcely received sufficient attention (p. 190). There is, for example, no mention of *Re Pryce* (1877) 4 Ch. D. 685.

The presence of certain defects in the exposition of some of the rules and principles is, however, far more than counterbalanced by merits which make the book most serviceable to beginners. It is welcomed as a short fresh explanation of the present-day law of bankruptcy by learned writers.

In many passages they have, moreover, by the definiteness and force of their treatment, brought clarity into difficult and complicated parts of the law.

H. D. H.

Reports of Cases Decided by Francis Bacon, Baron Verulam, Viscount St. Albans, Lord Chancellor of England, in the High Court of Chancery (1617—1621). Prepared from the Records of that Court by John Ritchie, M.A., of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1932. xxxii and 302 pp. (£2 2*s.* net.)

Mr. Ritchie has increased our knowledge of Chancery jurisdiction during the years 1617—1621; and in so doing he has enabled us to form an estimate of Bacon's place as an equity judge. In his Preface Mr. Ritchie has not only dealt with aspects of the constitution and practice of Chancery in Bacon's time, but he has also drawn attention to certain features of the judicial activity of Bacon as Lord Chancellor. Sir William Holdsworth has already stressed the point that certain of Mr. Ritchie's statements need reconsideration (see 'Francis Bacon's Decisions,' *Law Quarterly Review*, January, 1933, pp. 61—69). The chief value of the book consists, in fact, in the presentation of Bacon's decisions. This task, it may be remarked at once, Mr. Ritchie has accomplished in a skilful and scholarly manner.

To the student of the history of English equity this collection of cases is of great usefulness. It is to be observed, however, that the cases presented to us are not 'reports'; for no reports of Bacon's decisions were ever made. Mr. Ritchie has gone to the 'records' contained in Chancery Proceedings, and from these and other records he has himself summarized the cases. Short of reproducing the original text of the record, this was indeed the only method open to Mr. Ritchie, and by giving references to the manuscript materials he has made it possible for any reader, if he feels so disposed, to consult the original records themselves. In making from the records what he calls 'reports' of Bacon's decisions, Mr. Ritchie has set forth, for every separate case, the relevant facts, the issues raised, and the order or decree of the Court thereon; and he has also added headnotes and catchwords. The names of counsel, though they are in most cases mentioned in the records, have not been included. In stating the order or decree, the language of the register books has in general been followed. The headnotes and catchwords are helpful, but they do not always disclose all the main points in the cases. Thus, only a careful reading of Mr. Ritchie's report of the case of *Horne* v. *Darbyshire* (p. 188) reveals the presence of an interesting mortgage; the catchwords 'Term of a thousand years' do not disclose it. As a key to the subject-matter of the cases, the Index is most useful; it supplements the headnotes and catchwords.

The publication of this volume should do much to enhance Bacon's reputation as an equity judge. Some of his contributions to the growth of substantive and procedural equity are mentioned by Mr. Ritchie (pp. xvii—xviii), and a fuller statement of Bacon's work in the province

of equity will be found in the interesting article, already mentioned, by Sir William Holdsworth. Thus, for example, Bacon introduced the writ of sequestration (see pp. xvii, 141, 181), and by allowing the tenant for life to sell settled property (see pp. xvii, 126, 201) he not only anticipated later Chancery decisions but also an important provision of the Settled Land Acts. In many directions, in fact, Bacon left a permanent influence on the development of equitable jurisprudence; and in Mr. Ritchie's valuable collection of cases this Baconian contribution may now be studied at first hand.

H. D. H.

Contributions to International Law and Diplomacy: *Annual Digest of Public International Law Cases. Years 1919—1922.* Edited by Sir John Fischer Williams, C.B.E., K.C., and H. Lauterpacht, LL.D., Dr.Jur., Dr.Sc.Pol. London: Longmans, Green & Co. 1932. lv and 510 pp. (45*s.*)

It is a curious result of the order in which the volumes of the 'Annual Digest of Public International Law Cases' have appeared (this is the third, the previous volumes having dealt with the years 1925—26, and 1927—28), that while there can be no cross-reference from the digest of the *Lotus Case* [1927] to that of *R.* v. *Godfrey* [1922] there is a footnote reference from the earlier to the later case. And there are other references which thus seem to defy chronology. Such references can of course only be convenient, but they raise the question of the co-ordination of the information contained in these now indispensable volumes.

The object of a digest is not to report cases, but to give some indication of the line of cases that have arisen on some particular topic. The general index to these volumes, which sooner or later will have to be prepared, will therefore most usefully tell the reader, not where particular cases are to be found, but where particular topics are dealt with. For this purpose the 'Classification' given at the beginning of each volume will form the most suitable basis, references being given to the digested cases under each of the sub-headings there enumerated. But may not the usefulness of the 'Classification' be even now increased? The reviewer at random tried to find what cases there were in this volume on State responsibility for debts. The Classification told him that this topic would be dealt with in Part V, B IV. Reference was now necessary to the Table of Contents, which informed him that Part V began on p. 169. Turning to p. 169, it was soon discovered that there was no section B IV in this volume, but would not a short [nil] (*sic*) in the Classification (or a page number) have been simpler?

The matter in this volume teems with interest. Sufficient indication of the scope and interest of the cases digested is given by a mere enumeration of a few of those decided in English Courts: *The Zamora, The Leonora, The Blonde and other ships, Fenton Textile Association* v. *Krassin, Re Ferdinand ex-Tsar of Bulgaria, Luther* v. *Sagor, Johnstone* v. *Pedlar.* And the foreign cases, especially the Austrian succession cases, are no less interesting. There are no judgments of the Permanent

Court of International Justice in this period, but there are three Advisory Opinions. Logically there is hardly more justification for the inclusion of these than for the inclusion of the national Opinions of Law Officers. But of course there is every reason on grounds of convenience, and now happily Professor Smith is adding his labours to those of Moore in supplying a means of reference to these latter. But may not the Opinions of Committees of Jurists appointed by the League run the risk of being left out in the cold? Their inclusion in this digest would be almost on a par with the inclusion of the Advisory Opinions of the Permanent Court. Might not the editors perhaps strain a point?

B. E. K.

Contributions to International Law and Diplomacy: *A Guide to Diplomatic Practice.* By the late Sir Ernest Satow. Third edition. Revised by H. Ritchie, C.M.G., O.B.E., I.S.O. London: Longmans, Green & Co. 1932. x and 519 pp. (36*s*.)

Satow's 'Diplomatic Practice,' first published in 1917, was a work of three Books in two Volumes. 'A Guide to Diplomatic Practice,' a revised edition of the former, comprises four Books in one Volume. What has been the effect on 'Satow' of adding one Book and curtailing one Volume?

The addition of a new Book, which deals with the League and the British Commonwealth of Nations, was inevitable. 'Diplomacy,' begins Satow, 'is the application of intelligence and tact to the conduct of official relations between the Governments of independent States, extending sometimes also to their relations with vassal States.' So it was in the world that Satow knew, a world of States long sovereign, equal and independent of Papal or Imperial dominion, though swollen recently by their own adventures in imperialism. But already, and in two directions, there has been change. Within the field, for instance, of British diplomacy there must be added the conduct of the relations of the British Government with the League of Nations, which is not a Government, and with the Governments of other 'autonomous communities within the British Empire' which are neither completely independent nor in any way vassal States. In both cases new types of international persons have been produced, though by opposite tendencies in social evolution, the tendency towards integration of a new world society, and the tendency towards disintegration of a former imperial system. With the diplomatic problems involved in these developments Mr. Ritchie has dealt most adequately. To make room, however, for the additional chapters and for the latest cases and precedents on subjects such as diplomatic privileges, treaty formalities and international conferences, and in order to reduce into one volume the contents of the previous two, there has been a rigid cutting and recasting of the text. The result is that the personal touch of the author has disappeared. The Chapter on Advice to Diplomatists seems now almost out of place. And in other ways the effort to condense may be regretted. Though reduced

in bulk by well over three hundred pages the single volume is nearly as heavy as the former two. Larger pages, lighter type and frequent omission of spacings between the sections do not make it any pleasanter to read, while the omission of short titles to the sections from any part of the work makes their numbering meaningless, reference more difficult, and the task of a reviewer infinitely harder! Though much historical matter has inevitably been excluded, surely room might have been found for a reference to the excellent historical sketch of diplomatic intercourse in Butler and Maccoby's 'Development of International Law,' which appeared in the same series as this volume in 1928?

But though its elegance for the library shelf has been diminished, for the office of the diplomat 'Satow' remains indispensable, and all students of modern International Law will be grateful to Mr. Ritchie for the care he has bestowed on this new edition.

B. E. K.

The Law of the Air. By Arnold D. McNair, C.B.E., LL.D., of Gray's Inn, Barrister-at-Law. London: Butterworth & Co., Ltd. 1932. xvi and 249 pp. (12*s.* 6*d.*)

This work—embodying the Tagore Law Lectures for 1931—which, from the association of its title with its author's distinguished contributions to the study of Public International Law, the reader might expect to be concerned with that subject, deals with the aeronautical law of England, and the rules of Public International Law only so far as they affect the former. Nor does it extend to other uses of the air, such as wireless telegraphy, telephony or broadcasting. The chapter on Jurisdiction in respect of Aircraft will repay study by all who have to teach, or for other reasons to acquire a substantial knowledge of, the subject variously known as Conflict of Laws or Private International Law.

There is an interesting discussion of the old controversy as to whether a person who enters into the air space above another's land may be sued in trespass or nuisance, which, as Dr. McNair points out, is not rendered obsolete by section 9 of the Air Navigation Act, 1920, since there are many cases to which the section is not applicable and where the common law rules may still have to be applied. He collects the main authorities and, rejecting ownership of space, prefers the theory that '*prima facie* a surface-owner has ownership of the fixed contents of the air space and the exclusive right of filling the air space with contents,' and contends that even if the air space can be owned, the ownership must be limited to an 'area of ordinary user' surrounding and attendant upon the surface and any erections upon it, and does not extend *usque ad coelum.*

It is interesting to notice that Dr. McNair appears, so far as aircraft flying above a person's land is concerned, to cast in his lot with those who contend for the existence of a right of privacy, a matter upon which there is a strange dearth of actual authority in English law. The cases he cites do not seem to afford a sufficient foundation for this view, and it is assumed that it is based upon the exclusive right of the owner of the soil to fill the air space with contents, which, as distinguished from ownership of the air space, Dr. McNair admits.

The statutory tort created by section 9 of the Air Navigation Act, 1920, is dealt with, and some of the possible defences to an action based on it considered, but the author gives no inkling of his views as to the availability of the defences of act of God or inevitable accident. Probably the former at any rate would be held to be a good defence, but the point is by no means free from doubt.

The learned author's occasional touches of dry humour add to the enjoyment of reading. We confess that the statement that 'A State can exercise sovereignty over . . . the summit of an uninhabitable mountain, if it is in *de facto* control and is in a position to suppress internal disorder . . .' evoked a volcanic chuckle, and Mancunians will appreciate the comment that in a case cited the Judges accepted counsel's invitation to take 'judicial notice that rain falls from time to time.'

Two small misprints caught our eye. On p. 6 (note) 'Act of 1930' should read 'Act of 1920,' and on p. 73 the words 'scope of the' are reproduced twice.

Appendices contain international Conventions relating to aerial navigation and transport, a reprint of the Air Navigation Act, 1920, and the General Conditions in use for international air transport. It may be noted that the Carriage by Air Act, 1932, in force July 12, 1932, has since been enacted to give the Warsaw Convention of 1929 the force of law in the United Kingdom as from such day as may be appointed by Order in Council. The Act may by the same means be extended to British Colonies and protectorates.

The book, which is characterized by its author's marked facility for lucid expression, is a worthy successor to Professor Winfield's Tagore Lectures of 1930, and every lawyer who numbers among his clients air transport companies or professional or amateur flying men should provide himself with a copy.

R. H. K.

Studies in the History of the Admiralty and Prize Courts. By E. S. Roscoe, Registrar of the Admiralty and Prize Courts. London: Stevens & Sons, Ltd. 1932. vii and 84 pp. (5*s.* net.)

In these ten short studies, five of which had already been published in periodicals, Mr. Roscoe has made illuminating contributions to our knowledge both of the history of the Courts and the law which they administered, and of the lives of some of the eminent judges. The three essays on Prize, namely, 'Maritime Prize,' 'The Prize Court in the Great War,' and 'The Privy Council in the Great War,' are essentially supplements to the learned author's History of the English Prize Court, which was published in 1924. The three studies of the Court of Admiralty are entitled 'The High Court of Admiralty—The Last Phase,' 'The Old Admiralty Lawyer's Book of Practice,' and 'History in the Muniment Books of the High Court of Admiralty.' By his examination of manuscript materials, notably Clark's *Praxis* and the Muniment Books, now preserved in the Admiralty Registry at the Royal Courts of Justice, Mr. Roscoe has thrown fresh light on several aspects of Admiralty

history; and it should be noted in passing that his brief reference to the Vice-Admiralty Courts may be supplemented by a reading of the chapter on 'The English Vice-Admiralty System' in Miss Crump's Colonial Admiralty Jurisdiction in the Seventeenth Century (1931). The biographical part of the book consists of sketches of the careers of four great judges. Sir Julius Caesar represents the sixteenth century and Sir James Marriott the eighteenth; while in the study of Lord Stowell we are brought into close touch with 'the creator of case law' within the province of Admiralty and Prize jurisdiction. This sketch of Lord Stowell, Lord Eldon's distinguished brother, is all too brief; but the reader is consoled by the fact that in Mr. Roscoe's Lord Stowell: His Life and the Development of English Prize Law (1916), he will find many details of the great judge's personal and legal life. In his essay on Sir Samuel Evans the author pays a just tribute to the merits of an eminent modern judge: his work in the Prize Court during the Great War entitles him to lasting fame. Nor is this picture of Sir Samuel Evans painted only with the sombre colours of the law; for in it there appear the brighter and gayer tones of a very human personality. 'He enjoyed,' Mr. Roscoe tells us, 'the passing hour—the exercise of his intellectual gifts, the movement of the world around him, with its various figures, an amusing story, the sight of a good-looking woman, and the sparkle of a glass of champagne.' In this little volume the learned Registrar of the Admiralty and Prize Courts not only presents us with instructive history and biography; he also brings to us the entertainment which comes from a vision of the moving scenes of the past in which living men play their creative part in the work and growth of legal institutions.

H. D. H.

Poley's Law and Practice of the Stock Exchange. Fifth edition. By R. H. Code Holland, B.A., of the Middle Temple, Barrister-at-Law, and John N. Werry. London: Sir Isaac Pitman & Sons, Ltd. 1932. xvi and 452 pp. (15*s.* net.)

The re-writing of parts of this useful book has been occasioned in no small measure by the coming into force of the Companies Act, 1929, and the fact that there have been some recent decisions of importance. As a summary of the law and practice of the Stock Exchange the book will make an appeal not only to members of the Stock Exchange and of the legal profession, but also to bank managers, actuaries, company promoters, and all who are concerned with Stock Exchange transactions. Many parts of the book will be of interest to the general public, such as those which deal with the history and government of the Stock Exchange (pp. 1—37), the terms in use on the Exchange (pp. 299—337), and its business (pp. 59—74). The value of the manual is enhanced by the inclusion of the rules and regulations of the Exchange and an appendix containing forms; while the table of statutes and cases will facilitate reference to the legal authorities. To the law student the book

may be recommended as an introduction to some of the mysteries with which he will be concerned in practice at a later stage of his career.

H. D. H.

The Merchant Shipping Acts. By Robert Temperley, M.A., of the Inner Temple, Barrister-at-Law. Fourth edition. By the Author, now a Solicitor of the Supreme Court, and William Lennox McNair, LL.M., of Gray's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1932. lxxxviii and 892 pp. (£2 10*s.* net.)

Both merchants and mercantile lawyers will welcome this excellent edition of a standard work. Since the appearance of the third edition, a little over ten years ago, five new Merchant Shipping Acts have been added to the mass of legislation in amendment of the original Act of 1894; and, moreover, during this same period the Courts have increased the bulk of the case law. Not only has this new law, both statutory and judicial, been incorporated and annotated in the present edition, but the whole work has been revised and in part re-written. As the British Ships (Transfer Restriction) Acts, 1915 and 1916, were repealed, as spent, by the Statute Law Revision Act, 1927, they are not included in the present edition; but the text of those Acts and annotations thereon will be found in the third edition. As the editorial comments on recent changes in the law are numerous, it is impossible in the present notice even to mention them *seriatim*. As illustrations of the value of the present edition attention may be drawn, however, to p. 16 (specific performance of a contract for sale of a ship, pp. 102, 114 (a master's lien), and p. 588 (recovery of pilotage dues in the Admiralty Court, by proceedings *in rem* or *in personam*, as well as in a Court of summary jurisdiction). Among the many other interesting matters arising out of the progress of the last ten years are the application of the Merchant Shipping Acts to Northern Ireland and the Irish Free State (see p. 87, n. (*b*)), and the provisions of the Merchant Shipping (Wireless Telegraphy) Rules, 1927 (pp. 757—767). In dealing with the claim for necessaries supplied to a foreign ship, attention is drawn to *The Arbonne* (1925) 23 Ll. L. R. 141, as showing that the law in Scotland is the same as the law of England. Regret is expressed by the learned editors that the International Conventions respecting Maritime Lien and Mortgages, Limitation of Liability, Safety at Sea and Load Lines, to which all the leading maritime Powers are parties, have not yet received Parliamentary sanction; and they rightly hold that this delay on the part of Parliament retards the movement for the unification of the law relating to maritime matters (p. iii).

H. D. H.

Carriage of Goods by Sea Act, 1924, including the Rules relating to Bills of Lading (the Hague Rules). With Notes by Robert Temperley, a Solicitor of the Supreme Court, formerly of the Inner Temple, Barrister-at-Law. Fourth edition. By the Author and Francis Martin Vaughan, of the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1932. xix and 152 pp. (10*s.* net.)

The last edition of this work, which is intended to be supplementary to the standard text-books on the law of carriage of goods by sea, appeared in 1927. Since that time there has been a number of important decisions in interpretation of the Act of 1924 and the Rules; and, in addition, some of the judges have given expression to various *dicta*. This judicial guidance upon many points of interpretation has been incorporated in the present edition, which is a short but lucid and useful statement of the existing law. The Act of 1924 gives the force of law to the 'Rules relating to Bills of Lading' (the 'Hague Rules') which are contained in the Schedule to the Act. Readers of the present edition will be especially interested in the paragraphs which deal with Article IV, Rule 2 (Navigation and Management), pp. 44—62, and Article IV, Rule 4 (Deviation), pp. 71—79. In dealing with Rule 2 the learned editors comment on the important case of *Gosse Millerd* v. *Canadian Government Merchant Marine* [1929] A. C. 223 (pp. 46, 49, 50, 54); while in their treatment of Rule 4 they consider the effect of *Stag Line, Ltd.* v. *Foscolo, Mango & Co., Ltd.* [1932] A. C. 328 (pp. 73, 75, 79), which is also a case of much interest. The present work includes the text of the Act of 1924 and its Schedule (pp. 93—103). In the Appendix the reader will find a summary of the progress and state of 'Hague Rule legislation' throughout the world (pp. 105—125). The work also contains references to some of the Dominion, Colonial, and foreign decisions (*passim*).

H. D. H.

Principles and Practice of the Criminal Law. By S. F. Harris. Fifteenth edition. By A. M. Wilshere, M.A., LL.B. London: Sweet & Maxwell, Ltd. 1933. l and 708 pp. (15*s.*)

This well-known book is again produced under the skilled editorship of Mr. Wilshere. It is now of formidable size and for that reason likely to be less popular with juvenile readers than it formerly was. Judged as a handy book of reference it is extremely valuable. Although the more advanced student will frequently consult it with advantage, it is not so suitable as a book of study for beginners. The reason is that general principles are accorded insufficient treatment; thus, out of the 708 pages of the book only 17 are devoted to the mental elements of a criminal offence, including general defences, incapacity, and exemptions from liability. Probably because of this economy of space the statements of principle are not always entirely satisfactory, the fetishes of the old text-books and judgments being repeated without critical examination. Thus, in

reference to negligence, we are told that in criminal proceedings the test is whether the accused person is 'guilty of such culpable negligence as in the opinion of the jury amounted to criminal misconduct deserving of punishment' or 'such gross and culpable negligence as would amount to a culpable wrong and show an evil mind.' Any intelligent student can demonstrate at once that such so called definitions are merely circular and define nothing. Again Attempts are treated inadequately: though it is only fair to say that this criticism can be made of almost any text-book, or even judgment, dealing with this topic. On the specific crimes, however, the book is a mine of readily accessible information, and the large number of readers who have been helped by it in the past can be assured that the present edition fully deserves the continuance of their confidence.

J. W. C. T.

Soviet Administration of Criminal Law. By Judah Zelitch, LL.M. University of Pennsylvania Press: Humphrey Milford. 405 pp. (28*s.*)

This book contains a detailed account of the Soviet system of criminal Courts and criminal procedure, as they stood in 1931; this is prefaced by a history of earlier Soviet practice, with a short exposition of the Imperial judicial system in an appendix. Soviet legal institutions are not intelligible unless their basic theory of the judiciary is understood; the author appreciates this, but his orderly treatment of Courts and their procedure means that the theory is to be found scattered through the book. 'The Soviet Court . . . is considered an active governmental agency which investigates, tests and decides in accordance with the policies of its government . . . it is the *Court* and *not the parties*, that carries on the judicial enquiry' (p. 210). And yet the idea of a trial as a contest between the accused (presumed innocent) and the State, with the Court as an independent arbiter, is the dominating conception in most criminal trials (Chap. VIII). In dealing with political cases, mostly in the Provincial Courts, as continuing the revolutionary tribunals, the 'contest theory' gives way to the doctrine of enforcing policy. In all Courts the social class of the accused and many other factors are considered relevant (p. 172), a logical result of strong beliefs in the importance of environment. But: 'The truth is that whatever the Soviet theory concerning the judiciary may be, the Soviet Courts are called upon to deal with judicial questions in a judicial way' (p. 364). The Russian judicial reforms of 1864, founded largely on the French system, brought Russia into line with general continental practice; the persistency of pre-revolutionary juristic concepts is as interesting to the sociologist as it is annoying to Mr. Krylenko, the Commissar for Justice. Trial by jury has been abolished, but in the ordinary Courts of first instance there are 'co-judges' (usually translated as 'assessors') who are laymen. The author does not deal with substantive law, but it is interesting to note in this connexion that the Soviet Criminal Code, and much of the Civil Code, is orthodox and unexceptional.

Chapter XI, dealing with the Personnel of the Judiciary, is one of

the most interesting. The author should have pointed out that the Courts he describes also exercise civil jurisdiction, so that the whole law is largely administered by men with little legal training. Most of the Judges have received only elementary education; less than a quarter of the Judges of higher Courts appear to have received any legal education (p. 330). How does the system actually work? The author has been too much absorbed with the composition of the judiciary and the rules of Court to give more than the bones of the subject.

R. M. J.

The Statute of Frauds: Section 4. By James Williams, LL.M. (N.Z), Ph.D. (Cantab.). Cambridge University Press. 1932. xxxii and 299 pp. (15*s.*)

Of this wholly admirable book, which incorporates a thesis accepted for the Ph.D. degree, Professor Hazeltine says in the foreword:

'Dr. Williams has written an illuminating treatise. . . . By his scholarly analysis of the cases, many of which are of conflicting tendency, as well as by his skill in weaving the principles laid down by the judges into a consistent entity, Dr. Williams has greatly lightened the labour alike of Courts and practitioners in all the many jurisdictions where section 4 is still a part of the law that is administered.'

The present reviewer respectfully concurs in that judgment as a whole. But special praise should be given to Part II, Chap. I (though Dr. Williams would be well advised not to appear to associate himself with the untenable distinction proposed by Sir John Salmond between 'document' and 'instrument' in simple contract), and Part III, Chap I (though at p. 163 such cases as *Chaddagh S.S. Co.* v. *Steven* [1919] S. C. (H. L.) 132 should have been noticed).

If a second edition is called for, the following suggested criticisms may prove useful: pp. 30—31, the distinction between a contract performable, and one determinable, upon a contingency is not taken; p. 35, *Donellan* v. *Read* does not appear indistinguishable from *Reeve* v. *Jennings*; p. 82 ff., the 'authenticated signature fiction' is perhaps overelaborate; pp. 109 and 140, there is a confusion between Lord Mansfield and Mansfield C.J.; p. 136, *Taylor* v. *Smith* may probably in the whole current of modern decisions be taken as more frankly wrong; Part III, Chap. II, McCardie J.'s judgment (though certainly cumbersome and almost certainly *obiter*) in *Hartley* v. *Hymans* [1920] 3 K. B. 475, should have been noticed as it purports to review the authorities: this chapter would perhaps be easier if a variation wholly otiose were not called simply a variation; and in Part III, Chap. V, a reference should be given to the article in 41 L. Q. R. 79.

Dr. Williams advocates the repeal of section 4. Whatever may be the commercial advantages, it would seem a pity to destroy so excellent and curious a branch of meticulous legal learning now that it has been made the subject of a truly lucid exposition.

C. J. H.

The Principles of Company Law. By J. Charlesworth, LL.D. (Lond.). London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1932. xlviii and 306 pp. (7*s.* 6*d.*)

Dr. Charlesworth has accomplished at least as successfully as any of his predecessors the task of presenting to students a summary of the law contained in the Companies Act, 1929. Company law baffles the text-book writer intent on presenting his student reader with an outline of the principles stripped of intricate detail. The author, with a long experience of teaching behind him, makes no pretence of doing much more than showing the company system in actual operation. After an historical note and three pages devoted to broad outline the reader is taken straight to the Memorandum of Association, whence the legal life of a company is explained until its dissolution. The chapter on statutory companies, *i.e.* public utility undertakings incorporated by special Acts, is valuable. No reference is made, however, to the important modern device of Private Estate Companies. We wish Dr. Charlesworth had expanded his preliminary pages into a dynamic exposition of a company in being by way of introducing the beginner to what is, after all, for the average law student, unknown territory. In some cases further explanation seems desirable; no explanation is offered as to why, although a balance sheet must be certified by auditors, no similar provision is made with regard to the profit and loss account (p. 5); again, while preference shares are fully discussed, there appears to be no explanation of the term, ordinary share. The difficulty of discussing the principles of company law would have been lessened had the historic *Daimler Case* been fully treated; it is only cited in a footnote in the chapter on the Secretary (p. 145).

Subject to these suggestions, the book is a lucid exposition of this branch of law. The 'get-up' is admirable and every assistance is given to the student by emphasizing well-known rules and their exceptions, which are amply illustrated by summaries of cases. The book should more than hold its own with its rivals in this subject.

E. C. S. W.

The Carrier's Liability. By Eric G. M. Fletcher, LL.D., B.A. (Lond.), Solicitor. London: Stevens & Sons, Ltd. 1932. xvi and 281 pp. (12*s.* 6*d.*)

Dr. Fletcher, a busy London solicitor who graduated in the University of London through the Law Society's School of Law, has written a learned thesis on a subject which the present reviewer before reading the volume would have unhesitatingly described as well known and fully covered by legal historians and other writers of repute. But the author has shown admirably that there was in his subject ample ground for further research and the result of his labours has been fully repaid, for he has succeeded in exposing some fallacious conclusions in a most convincing manner. The well-known passages by Mr. Justice Holmes in his Common Law on the early history of a bailee's liability are shown to be unsupported

by any adequate authority. So far from the history of the carrier's common law liability having been steady and continuous, as Holmes asserted, Dr. Fletcher proves by a careful examination of the authorities leading up to *Southcote's Case* that the old Norman doctrine of absolute liability as re-stated by Coke is opposed to the decisions of the four centuries which preceded that case.

We cannot attempt in the limits of a short review to do justice to Dr. Fletcher's theme. Suffice it to say that the book makes a valuable contribution to legal history. It serves to illustrate the value of legal research to the problem of the law reformer, and no one can undertake work of this description so competently as an academically trained practitioner. The anomaly of the carrier's liability traced out century by century is put into proper perspective, and the lucid summary of nineteenth- and twentieth-century development indicates to the legislator not merely the need for regulating the future relations between the road carrier and his customers, but also the way in which such regulation can be effected, avoiding the pitfalls into which the Courts—and in particular the Common Law Courts—fell in the past.

Even Lord Mansfield cannot escape from strictures (p. 67). Special mention should be made of the treatment of sea carriage through the ages (Chaps. IV and V (part) and Appendix II), as well as of the suggestive note (Appendix III) entitled 'Is an Air Carrier a Common Carrier?'

E. C. S. W.

Some Aspects of the Theories and Workings of Constitutional Law. By W. P. M. Kennedy, Professor of Law in the University of Toronto. New York: The Macmillan Company. 1932. xiv and 142 pp. ($1.50.)

This little book consists of four lectures delivered at Lafayette College in 1931. The purpose of the first lecture is to stress the author's conception of the State as a socially created association and to demand that in both public and private law social standards should be applied with discrimination lest legal force be given prematurely to the solution of social problems on which information is as yet inexact and problematical. The second lecture, 'Theories of Law and the Constitutional Law of the British Empire,' examines the old theory of the supremacy of the Common Law and emphasizes the rise of parliamentary sovereignty as a revolutionary concept of the seventeenth century, never, it is suggested, accepted by the colonists. There is a note of warning lest the Statute of Westminster, 1931, may initiate a newer legalism as customary rights have passed into statutory definition. The author believes the problems of the British Commonwealth to be problems of statesmanship and not essentially problems of law. Recent events at Ottawa and elsewhere support this contention, and certainly the statute contains some legal difficulties which it is to be hoped will never call for solution in a Court of law. 'Law and Custom in the Canadian Constitution' is the title of the third lecture, which is the most interesting of the group. Professor Kennedy asserts that both the American and Canadian Constitutions

have developed along lines contrary to their founders' aims; the Provinces of Canada are in a stronger position of independence *quâ* the Dominion than the draftsmen of the British North America Act, 1867, can have contemplated. Provincial agreement is becoming indispensable to constitutional change. Consultation between federal and provincial governments preceded the enactment of the Statute of Westminster, and government by conference in Canada seems likely to form a substitute for the older conception of national government, as it is proving on the continent of Europe. In his last lecture Professor Kennedy bids us study Canadianism in the realm of politics and law. We note with interest that reform of the Senate is as hardy a perennial with party politicians as reform of the House of Lords with us.

The lectures are interesting reading and are at times provocative; the author does not believe in creating or teaching law *in vacuo* (pp. 24—28), and gives an interesting illustration of the former in the Canadian law of legitimation.

E. C. S. W.

Wolstenholme and Cherry's Conveyancing Statutes. Twelfth edition. By the late Sir Benjamin L. Cherry, Prof. D. Hughes Parry and J. R. P. Maxwell, Barristers-at-Law. London: Stevens & Sons, Ltd. Vol. I, pp. 1—807; Vol. II, pp. 808—2075. (£4 4*s.* net.)

Surely it was time to abandon the absurdity of describing as a 12th Edition the standard commentary on the conveyancing legislation of 1922—1925.

But that is a small point. We think that those who are 'doing well out of the Acts' in Lincoln's Inn ought to get together to present a handsome testimonial to those who, for the pittance which editorial work earns, have lightened the practitioners' labours and swelled their fee-books.

The editors acknowledge appreciatively the help given to them first by the late J. Chadwick, formerly their co-adjutor, referring appropriately to his self-denying character and loyal friendship, and secondly by Messrs. A. E. Russell, F. C. Watmough, B. B. Benas, and A. H. Withers. They also pay a tribute, which all who know will regard as justly due, to the weekly articles of the veteran Mr. J. M. Lightwood, the last survivor, alas, of his generation of Real Property lawyers of profound erudition and critical scholarship.

One comment, not on this edition particularly, we think should be made. It seems that, ideally, the standard commentary on a Statute should not be made by the draftsmen, or, if it is, then the fact that it is so made should be stated, and the commentators should frankly say, when faced with a tangle, 'we meant such and such, but unfortunately we made a mess of it; we suggest that the Courts can get round the difficulty in this way.'

But this comment does not imply lack of appreciation on our part of what the editors have done, and we respectfully express our gratitude

to those who have completed the work of Sir Benjamin Cherry. We associate ourselves with the many who lament his untimely death.

This journal is not the place for detailed professional criticism: we limit ourselves to one small request. In the next edition will the editors consider the deletion of the colloquial first sentence on page 840—'This para. sweeps up the remaining equitable charges, not otherwise specifically named, which require protection'—and give us some examples?

H. A. H.

The Victims of Fraud. By Eustace J. Harvey. Oxford University Press. Humphrey Milford. 1932. 8vo. xxx and 304 pp. (24*s*.)

All the obvious things have been said about this work in the January number of the 'Law Quarterly Review,' and no purpose will be served by repeating them. The author conceived an admirable project and it is a thousand pities that he did not have the benefit of skilled advice as to the method of carrying it out. But in spite of its blemishes Mr. Harvey has done a useful piece of work, for which the present reviewer for one is grateful, by collecting in convenient form cases illustrative of the sad situation which arises when one of two innocent parties must suffer owing to the fraud of a dishonest third, and by criticising the operation of the present law by which it is decided on which of the two the loss is to fall. Among such frauds are that of B obtaining A's goods by false pretences and selling them to C, that of a dishonest factor, that of a broker who wrongfully pledges his client's securities, those of criminals who forge bills or steal cheques. All this work will be of use to many teachers and students, though they must be on the look-out for inexact statements. It will also be useful if ever a Commission is entrusted with the task of producing a code reforming this branch of the law, though it is not likely that Mr. Harvey's draft enactment will be taken as a basis.

In particular Chapter III, of twenty pages, on the Factors Acts, can be recommended to students, for it contains information, not readily accessible to them elsewhere, as to the report of the Select Committee of the House of Commons of 1823 'on the Law relating to merchants, agents or factors,' on which the first Factors Act was based, and as to the alterations made in the law by the successive Acts. It is probably known to few that the Committee of 1823, as Mr. Harvey states on page 77, reported that 'they would have liked to introduce into our law the principle of the law of Scotland and of the continental nations generally, that "possession of goods gives title."'

Before the task of amending the law could wisely be attempted it would be desirable to pursue a more exhaustive inquiry into American law than has been undertaken by Mr. Harvey, and to ascertain the practice of the leading European countries.

H. A. H.

Radulphi de Hengham Summae. Edited by Prof. W. H. Dunham, of Yale University, and published by the Cambridge University Press in Prof. Hazeltine's series of Cambridge Studies in English Legal History. lxxxiv and 90 pp. (12*s.* 6*d.*)

The Summa Magna was composed about 1275, the Summa Parva about 1285. The author, Sir Ralph de Hengham, served at different times during the reign of Edward I as Chief Justice of the Court *coram rege*, and as Chief Justice of the Common Bench. Seventy-five manuscripts containing one of the Summae, or both, are extant. The last previous printed edition is that of Selden, first printed in 1616, and many times re-issued. To Selden's erudite references throughout the fields of history and jurisprudence Professor Dunham protests that he can add nothing. 'They must stand as a monument to the learning of the age and its tribute to Hengham.'

The present text has been arrived at by the collation of seven manuscripts, representing six groups. The editor's work, obviously very laborious, in constructing a pedigree of the manuscripts, is preserved in typescript in the Yale University Library.

The editor gives us in fifteen pages a most interesting biographical sketch of Hengham, and Professor Hazeltine contributes one of his graceful and erudite prefaces. In the latter emphasis is laid on the difference in character between Bracton's writings and Hengham's. 'In reading Bracton one feels himself in the atmosphere of legal principles; in reading Hengham one is at once immersed in the subtleties of legal practice. Hengham is in fact one of many proofs that the common law was already tending to become rigid.' A similar change in the character of legal literature during the thirteenth and fourteenth centuries took place, we are told, in the principal countries of Europe; the reason for the change is due to various factors the relative values of which have not yet been estimated. For the future work of determining what was the dominant character of Edwardian procedure, and what Roman and canonical features it absorbed, the scholarly text now furnished by Professor Dunham will be indispensable.

H. A. H.

Daniell's Chancery Forms. Seventh edition. By Sir Charles Hulbert, a Master of the Supreme Court. London: Stevens & Sons, Ltd. 1932. xcvi and 1384 pp. (£3 10*s.* net.)

This edition of an old friend is a fitting memorial to the late Sir Charles Hulbert, formerly Senior Chancery Master, whose death on the eve of its publication is mourned by both branches of the profession. It is a pleasant feature of English legal life which we hope will long continue that highly placed officials of the Court and busy members of the Bar are able to write and edit text-books for the benefit of their fellows in spite of the many calls on their time and in spite of the scantiness of the financial reward of such work.

Precedents of affidavits must always be a difficulty because the circumstances of cases vary so greatly that a complete form can seldom

be more than an example applicable to a solitary set of facts. It is often useful therefore to have a comprehensive note tabulating exactly what facts have to be proved on a given application rather than to have a form adopted to one imaginary set of circumstances. This method is successfully adopted in the present edition in the case of affidavits of next-of-kin (pp. 444, 445): the note would be more accurate if paragraph D (3) read 'The *marriage and* birth of issue, etc.,' and if paragraph E read 'If no brother or sister of the whole blood *or their issue* survived, etc.,' but that is only a small criticism of an excellent statement. In the next edition it might be well to include an alternative of the form adopted to comply with Order 55, Rule 14 A, to meet the case of a summons raising more than one question: we believe the wording usually employed is 'The relief sought by paragraph (*blank*) of this summons is sought under section (*blank*) of the (*blank*) Act, 1925.' Many users of this book might also welcome a few more precedents of specific questions for use in the applications by originating summons that are frequently occurring in practice, *e.g.*, an application to the Court to sanction a provisional contract for the purchase of part of a trust estate by one of the trustees. In the absence of a new edition of Mr. Marcy's little book of forms, a collection of such questions in Daniell would increase its value to many to whom it is already indispensable.

R. W.

The British Year Book of International Law, 1932. Thirteenth year of issue. Humphrey Milford, Oxford University Press. vi and 250 pp. (16*s.*)

This volume of the Year Book maintains the high standard which its readers have come to expect. It fittingly opens with the inaugural address to the Institut de Droit International by its President, Professor Pearce Higgins, at the successful session held at Cambridge in 1931. The editorial committee give recognition to the ever-increasing importance of private international law by the inclusion of an interesting article on reciprocity in regard to foreign judgments by Dr. Gutteridge. The economic and political stupidity of the Reparations Chapter of the Treaty of Versailles has been fully demonstrated, and now Sir John Fischer Williams exposes its legal defects in a 'Legal Footnote to the Story of German Reparations.' Incidentally the author takes the opportunity to make some useful points on international personality and on the equality and corporate responsibility of States. Mr. Fachiri discusses the judgments in the Austro-German Customs Case, favouring the view taken by Judge Anzilotti that the question before the Court was one of fact, and not, as the other judges regarded it, one of law. Mr. Bushe-Fox continues his account of the extent to which the existence of 'Unrecognized States' was admitted in the early part of the last century with a review of Admiralty and Common Law cases. Miss Bacon contributes an article on the British and American policy in respect of fluvial navigation, and there is an examination of the term 'Denial of Justice' by Mr. Fitzmaurice. There are the usual sections allotted to Notes, Decisions of International and National Tribunals, and reviews of books.

J. W. C. T.

The Constitution of the Irish Free State. By Leo Kohn, D.Jur. London: George Allen & Unwin, Ltd. 1932. 8vo. xviii and 423 pp. (16*s.*)

Dr. Kohn has been at pains to produce a book which is not merely a commentary upon the Constitution of the Irish Free State, but a description of the political philosophy which is its background. As a foreigner he has taken infinite pains to gain first-hand knowledge of the environment in which the Constitution functions. The instrument, despite its form, is derived from a different line of thought from that which has brought the other Dominions to their present status, and even in its form bears marks of similarity with continental models, *e.g.* the Declaration of Fundamental Rights (Arts. 6—9) and the Programmatic Declarations (Arts. 10—11), relating to free education and natural resources. The author's analysis of the various features of the Constitution is of great interest. Rightly or wrongly we formed the impression that the legalism of this Constitutional Code is a perpetual menace to good government. Political events prevented the adoption of a less rigid form of Constitution; the result has been a succession of amendments by the Free State Parliament which has extended to sixteen years its own power to effect such amendments by ordinary legislation.

The chapter on the Removal of Oath Bill presents both sides of the case with complete impartiality; the Annuities dispute is not touched upon. In other respects Dr. Kohn exhibits occasional marks of his natural bias towards a Constitution modelled on continental lines in contrast to the empiricism which marks Dominion Constitution-making. The book is a scholarly work and we cannot refrain from remarking upon the proficiency in the English language which this German author has acquired and employs to great advantage.

E. C. S. W.

An Historical Introduction to English Law and its Institutions. By Harold Potter, Ph.D., LL.B., Dean of the Faculty of Laws at King's College, London. London: Sweet & Maxwell, Ltd. 1932. xxvi and 600 pp. (20*s.*)

This is a valuable addition to the list of students' books designed to provide the historical foundations of modern law. It embodies the material of Dr. Potter's History of English Law, and his History of Equity, completely revised and very much enlarged. The plan, aim and treatment, together with a mass of new material, make it an entirely new work. Part I is a sketch of legal development from the Anglo-Saxon era to modern times, which is compressed into sixty-five pages. Part II is a complete history of all the Courts and of the jury system. Part III deals with the common law, its sources, procedure, contract, tort and property, and Part IV is concerned with the development of equity. Dr. Potter has accomplished his aim in making the book an historical introduction, and has been mindful of the beginner by explaining all technical legal terms. No publication of legal-historical research has escaped the author; no book could be more up to date in this respect, and the work is well done. After a careful perusal of the book we venture

to make the following minor suggestions and corrections of a few printer's errors. At p. 10—gavelkind, the L. P. A. 1922, should be supplemented by a reference to section 45, A. E. A. 1925, and at p. 407 the past tense becomes necessary for gavelkind. The reference at p. 26 (*z*) should be 21—22. The rendering of *ratio decidendi* into ' reasons for the ruling ' may mislead a student—p. 32, although it is correctly explained at p. 54. Eighteenth should be substituted for ' seventeenth ' century at pp. 53 and 150. It might be added at p. 89 that clause 34 of Magna Carta was intimately bound up with the lords' finances. A further limitation to ' appeals ' was due to the fact that the procedure by presentment, followed by conviction, was more beneficial to the King on account of the forfeiture of the felon's goods, which were not recoverable by the injured party until 1529. Reference could be made to the half-dozen statutes dealing with appeals—p. 335. For ' plaintiff ' read ' defendant '—p. 349, l. 9. Even within the limits available for the treatment of defamation—pp. 360—364, it should be emphasized that libel as well as slander was developed as a case action in the common law Courts; and that the criminal treatment of libel by the Star Chamber probably led later to the rule that it was actionable without special damage; further, that publication to the person defamed is sufficient to support an indictment. At p. 387 ' Common ' is an obvious misprint for ' Canon law.' *Ann jour et wast* is clearer when rendered into ' year *and a* day committing waste ' —p. 401. The term ' merchet ' appears to have been extended to a son's marriage—p. 409.

These are somewhat trivial points, but may be of some use in the next edition of this very useful book.

T. E. L.

Select Readings on the Law of Contracts from American and English Legal Periodicals. Compiled and edited by a Committee of the Association of American Law Schools. New York: The Macmillan Company. 1931. xcvi and 1320 pp.

Anglo-American legal literature can boast of no fewer than sixty series of legal periodicals, which, if bound in sets, would run into more than six hundred volumes. In this wilderness of printed matter there lie concealed a number of monographs on the law of contract which are of exceptional value both to the practitioner and the law teacher. These have hitherto been inaccessible, for the most part, to the average English reader, and it is with peculiar feelings of gratitude and satisfaction that we welcome the enterprise of the Association of American Law Schools in placing this admirable series at our disposal. It would be an invidious choice to single out any of the component articles for special praise because the general level of excellence is so high, and it will suffice to say that many of the essays now reprinted, such as those by Ames and Langdell, have become classics of the law. Not the least interesting feature of this volume is the preface, in which Judge Cardozo in his most brilliant manner defends the legal monograph against the charges of fugitiveness and futility which are so often brought against it. No one who desires to know the law of Contract can afford to overlook this volume, whether

he approaches the subject from the theoretical or practical point of view. Its utility to the advanced student is manifest. We venture to hope that the undertaking so happily inaugurated may be extended to other branches of the law which suffer in the same way as the law of Contract from the concealment of much precious material which lies buried amidst the pages of law reviews and magazines.

H. C. G.

The Permanent Court of International Justice. By Alexander P. Fachiri. Second edition. Oxford University Press. 1932. 416 pp. (21*s.* net.)

In the seven years which have elapsed since this excellent book was first published a large number of cases has come before the Permanent Court of International Justice, and its jurisdiction has been extended. The present edition is therefore enlarged, the arrangement of the subject-matter being the same as before, *viz.* four chapters comprising the history of the organization, the jurisdiction, and the procedure of the Court, with an account of the cases submitted to it up to the end of 1931, in two chapters. Chapter VII deals with the relation between the Court and the League of Nations. Finally, there is an appendix, which gives the text of the operative documents such as the Covenant of the League, the Rules of Court, and the protocols for the accession of the United States and the Revision of the Statute. This book should be on the shelves of every serious student of International Law.

J. W. C. T.

Leading Cases in Criminal Law. Being the sixth edition of *Warburton's Leading Cases in Criminal Law.* By W. Blake Odgers, of the Middle Temple, and A. H. Armstrong, of the Inner Temple, Barristers-at-Law. London: Stevens & Sons, Ltd. 1932. 8vo. xxviii and 476 pp. (15*s.* net.)

It is ten years since the last edition of Warburton's Cases appeared, but the changes which have taken place are well reflected by the editors in this edition. From the student's point of view Warburton's Cases can never be quite as useful as Kenny's selection, but Warburton's aim was to produce a book which should also be of some value to practitioners. Although he deals with a wide range of offences—*e.g.*, offences against statutes dealing with foreign enlistment and sexual offences—it hardly seems likely that this selection is nearly full enough in the treatment of the cases chosen to be of really adequate aid to the practitioner. On the other hand since only one case is referred to under the heading of Treason or Treason-Felony, while there are ten such cases in Kenny, it is probable that purely for the student's purpose the latter case book is more useful.

On the other hand the practice of adding short notes on a variety of other cases at the end of the treatment of a leading case, with references to still further cases, is one that lessens greatly the task of tracking down

the law on any particular subject and adds greatly to the completeness of the work.

This edition is attractively produced, and though probably not full enough to stand by itself is a valuable supplement to other case books on criminal law.

The folding guide to the cases which is to be found at the beginning of the book is especially useful for quick reference.

P. H. D.

The Cambridge Ancient History. Vol. IX. 1022 pp. with maps and tables. Cambridge University Press. (37*s.* 6*d.*)

The ninth volume of the *C. A. H.* is occupied with ninety years of civil war and takes us to the death of Julius Caesar. We begin with two chapters on the Gracchi by Mr. Last, and note with interest that the University Lecturer in Roman History at Oxford treats the reformers much more generously than was the fashion when we were at school. 'Tiberius and his brother were perhaps the first true democrats in Rome and, it may be added, the last.' Two chapters follow by the same writer, with contributions from Mr. Gardner, on the wars of Marius, in which we see the unconscious creation of a professional army and an addition to the dangers of the situation. After a sketch of the rise of Pontus by Professor Rostovtzeff and an account of the first Mithridatic war by Professor Ormerod, we return to Messrs. Last and Gardner for guidance through Sulla's dictatorship and the downfall of his plans. Mr. Gardner agrees with Mommsen in his high estimate of Sertorius, placing him 'not far beneath two of the giant figures of Roman republican history, Hannibal as a commander and Julius Caesar as a personality.' Three interesting chapters take us outside the Empire, Dr. Bevan describing the fortunes of the Jews from Aristobulus I to Herod, Mr. Hignett the Gauls and their conquest by Caesar, and Dr. Tarn the rise of Parthia, while Mr. Stevenson interpolates a chapter on the growth of the provinces and the improvisations by which they were governed, in which the dislike of the provincials for the Roman authorities is frankly recognized, illustrated and accounted for. The final crisis, the duel between Pompey and Caesar, in which for most of us the interest of the story reaches its climax, is entrusted to Professor Adcock himself, who in 130 exciting pages brings the history proper to an end. Admirers of the great dictator will have no fault to find with our professor's summing-up, though they may be surprised to read that 'Caesar had done much for the State in his reforms, but he did Rome no greater service than by his death.'

The volume concludes with four chapters on the literature of the age by Mr. Sikes, Ciceronian Society by Professor J. W. Duff, the Art of the Republic by Dr. Strong, and last—but not least—the Development of Law under the Republic by Professor de Zulueta.

'The *C. A. H.* gets better and better' has been said before by reviewers of previous volumes. It will have to be said again.

C. F. A.

Limitations of Actions in Equity. By JOHN BRUNYATE, M.A., Fellow of Trinity College, Cambridge. London: Stevens & Sons, Ltd. 1932. xxviii and 302 pp. (12*s.* 6*d.* net.)

WITH the exception of the concluding chapter on Recovery of Arrears this book is substantially the same as the Yorke Prize Essay for 1929, entitled 'Lapse of Time as a Bar to the Enforcement of Equitable Rights.' The chief topics dealt with are Fraud, Suits against Trustees, Laches and Acquiescence. The author's description of his subject in the Preface as one of those corners of English law which remain a little obscure is optimistic, particularly in the case of Fraud, but his closely reasoned analysis of the authorities and carefully considered conclusions lead us to hope that he will before long penetrate other obscure corners. We hope to contribute an adequate appreciation of this book in the next number.

E. C. S. W.

Palmer's Company Precedents for use in relation to Companies subject to the Companies Act, 1929. Part II, Winding-Up Forms and Practice. Fourteenth edition. By ALFRED F. TOPHAM, LL.M., Bencher of Lincoln's Inn, one of His Majesty's Counsel, ALFRED ROBERT TAYLOUR, M.A., and A. M. R. TOPHAM, B.A., both of Lincoln's Inn, Barristers-at-Law. London: Stevens & Sons, Ltd. 1933. clx and 1406 pp. (£3 3*s.* net.)

SINCE the passing of the Companies Act of 1929 this is the first edition of the part of Palmer's Company Precedents which deals with Winding-Up. As is stated in the preface, the new Act and Rules have rendered many of the old forms obsolete; most of the introductory notes have required to be substantially altered and in several cases they have been practically re-written. This edition is therefore indispensable to practitioners. There is more than compensation for the delay in the appearance of this volume in the fact that this delay has enabled it to be prepared with experience of the actual working of the Act and to contain a number of decisions as to the construction of the text.

There is evidence that this edition has been prepared with care and discretion. It is somewhat surprising, however, to find no reference to the decision in *Re Health Promotion, Ltd.* [1932] 1 Ch. 65, either in the chapter on Sale of Property or elsewhere; and the mention of Chapter X on page 270 appears to be an instance of an incorrect reference.

Reference is made to cases decided as recently as last November; and as regards *Re William Metcalfe and Sons, Ltd.* [1933] 1 Ch. 142, it would be churlish not to be grateful for the warning 'see, however,' and to expect a revision in this edition of the otherwise unqualified references on page 564 to the decisions in *Re National Telephone Co., Ltd.*, and *Collaroy Co., Ltd.* v. *Giffard.*

B. F. M.

Cases and Statutes on the Law of Evidence. By Ernest Cockle. Fifth edition. By Charles M. Cahn, B.A. London: Sweet & Maxwell, Ltd. 1932. lv and 583 pp. (18*s.* 6*d.* net.)

This edition maintains the high reputation of its predecessors, and in its arrangement, its accuracy and its thoroughness, it is a model collection of cases. Dr. Roland Burrows K.C. contributes an interesting introduction, in which he emphasizes the vital importance of the study of the rules of evidence both before and after commencing the practice of the law. Commendation for this edition from so distinguished an authority renders easy the work of a reviewer. The work has been admirably brought up to date, six new statutes have been incorporated, and Order XXXVIIIa (New Procedure List) finds a prominent place. Some of the older leading cases give way to modern decisions: *Duff Development Co., Ltd.* v. *Government of Kelantan* [1924], supplants *Taylor* v. *Barclay* [1828]; *R.* v. *Lapworth* [1930], displaces *R.* v. *Azir* [1725]. Among other recent cases we have *Hobbs* v. *Tinling* and *Engelke* v. *Musmann.* The group of cases which have grown around *Russell* v. *Russell* appear in a note, and here, perhaps, *Rimmer* v. *Rimmer* (1930) 144 L. T. 96 might have been added. The effect of recent statutes on the law of evidence is seen in the relegation of *R.* v. *Scaife* and *Wing* v. *Angrave* to the notes.

T. E. L.

Jurisprudence. By W. Nembhard Hibbert, LL.D. (Lond.), of the Middle Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1932. vii and 332 pp. (12*s.* 6*d.*)

This is a new work on Jurisprudence which should prove of considerable value to students for all examinations in this subject, being written with a view to their requirements by an author with considerable experience in teaching at London University and in the writing of students' text-books on legal topics.

He has collected within the scope of a moderate-sized book the opinions of the leading authorities on the main topics comprised in the science of Jurisprudence and given his own criticisms in a clear and generally illuminating manner. Jurisprudence, perhaps more than any other branch of legal study, is a subject which offers scope for differences of opinion, and we do not suppose that in every instance his readers will agree with Dr. Hibbert in the views he accepts, but the authorities have been well selected having regard to the main object of the book, and the work as a whole is exceedingly well done.

On p. 253, where he is discussing Salmond's views of the reasons for the growth of the idea of Quasi-Contract, we respectfully question whether his third paragraph is a correct representation of that author's view, and also whether the dogmatic assertion that detinue was contractual is justified. The exact nature of detinue is still unsettled. (See *e.g.* Holdsworth, History of English Law, II 368; III 420.)

Used with the recognized text-books, the student should find this volume a considerable boon.

R. H. K.

The Law of Arbitration and Awards. By HORACE S. PALMER, M.A. (Oxon.), of the Inner Temple, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1932. xx and 160 pp. (6*s.*)

THIS little book contains a clear and concise statement of the law relative to arbitration, intended primarily for students for the Accountancy examinations, but its appeal is not confined to them. For those engaged in commerce and in the law also it has interest, for the former as a summary of a branch of the law which much concerns them, and for the latter as a useful introduction to the larger works on the subject, such as Russell.

All the more important recent decisions have been included, with the exception of *Re Franklin and Swathling's Arbitration* [1929] 1 Ch. 238, which we should have thought worthy of notice. The decision in *Freshwater* v. *Western Australian Insurance Co., Ltd.* (1932) 76 S. J. 888, that a third party claiming under the Third Parties (Rights Against Insurers) Act, 1930, cannot disregard an arbitration clause and sue the insurance company when no award has been made, was not given until after publication of the work under review.

Appendices contain test questions for the student and relevant provisions of statutes.

R. H. K.

A Treatise on the History and Law of Fiduciary Relationship, together with a Collection of Selected Cases. By ERNEST VINTER, M.A., LL.M. (Cantab.), Solicitor. London: Stevens & Sons, Ltd. 1932. xii and 142 pp. (10*s.* 6*d.*)

THIS little book treats of those rules of Equity, generally classified under the head of constructive fraud, which concern the exercise of undue influence.

It commences with a short chapter on their nature and origin, which is to a great extent concerned with the corresponding rules of the Roman law, to whose inspiration their existence in English law is largely attributed by the author.

This is followed by an epitome of decided cases and an analysis of the rules.

The idea of the book is a good one and the collection of cases useful, but it is impossible not to regret the impression conveyed that the work must have been finished in haste, arising from the absence of notice of important recent decisions, such as *Inche Noriah* v. *Shaik Allie Bin Omar* [1929] A. C. 127, and *Re Lloyds Bank, Ltd.*; *Bomze* v. *Bomze* [1931] 1 Ch. 289, and the presence of a number of formal defects which should have been corrected in the proof.

R. H. K.

Introduction to Real Property Law. By J. A. Watson, LL.D., B.Sc., of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 274 pp. (15*s.* net.)

Dr. Watson, who has had long experience of the work of teaching the foundations of the law of real property, tells us in his Preface that he has attempted to write an Introduction, in which beginners will learn the first principles before they attempt larger treatises such as that of Dr. Cheshire. A book of 270 pages, which on page 146 deals with so advanced a topic as the application of the Rule against Perpetuities to special powers, hardly seems to fulfil the function of an introduction. Dr. Watson seems to have attempted to compress everything which a candidate for an examination in Real Property Law is expected to know, and to have done it remarkably well. We think that his work will be very useful, not as a first book, but as a revision book just before examination.

H. A. H.

Annual Survey of English Law, 1931. Prepared by members of the Department of Law and International Studies at the London School of Economics, and published by the School. 380 pp. (10*s.* 6*d.*)

It is impossible to exaggerate the usefulness of these annual surveys. For the benefit of those who are unacquainted with them it may be stated that they are divided into fourteen sections:—Jurisprudence, Legal History, Constitutional Law, Local Government and Administrative Law, Family Law and the Law of Persons, Property and Conveyancing, Contract, Torts, Mercantile Law, Industrial Law, Criminal Law, Evidence and Procedure, Conflict of Laws, Public International Law. In each section an account is given of the year's output in Legislation, Case Law, and Literature, literature including a bibliography of articles in those periodicals which are accessible in this country.

At the time of writing we are in possession of the good news that a Survey for 1932 is being prepared, and may be issued before this notice appears.

We urge all who are interested in legal literature to join in ensuring the continuance of this series by subscribing to it.

H. A. H.

A History of English Law. By Sir William Holdsworth, K.C., D.C.L., Hon. LL.D., Vinerian Professor of English Law in the University of Oxford. Tables and Index. By Edward Potton. London: Methuen & Co., Ltd. 1932. 8vo. 228 pp. (21*s.*)

This volume comes as a great boon to every student of the history of English law. Sir William Holdsworth's monumental work is now the

great reservoir to which students thirsting for information on any point of English legal history resort in the first place, and Mr. Potton has earned our gratitude by providing so excellent a guide to the contents of that great treatise. Sir William Holdsworth and the publishers are to be congratulated on having secured so competent and experienced a collaborator as Mr. Potton for this task. We have noticed only one obvious slip which might have been included in the Errata. On p. 149 *genes* should be *gentes*.

Rogers on Elections. Vol. III. Municipal and other Elections and Petitions. Twentieth edition. By J. Lhind Pratt, Barrister-at-Law. London: Stevens & Sons, Ltd. 1933. xi and 261 pp. (15*s*.)

The new edition of this volume of Rogers on Elections is called for on account of recent legislation. Mr. Pratt succeeds Mr. Willoughby Williams in the editorship. The work is the first, and one might say the final, authority upon which those concerned with local elections rely.

E. C. S. W.

The Spirit of Our Laws. By Herman Cohen. Revised edition. Edited by A. P. G. Ransome, of the Inner Temple, Barrister-at-Law. London: Methuen & Co., Ltd. 1932. xv and 293 pp. (7*s*. 6*d*. net.)

We welcome the issue of a new edition of this most useful work. In reviewing the previous edition we recommended its perusal by everyone beginning the study of English law as describing the practical working of our legal system in a clear and readable manner. It is much to be regretted that the learned author did not live to put his added notes on the legal profession into final form, but they contain much material with which others will be able to build, it is to be hoped with due acknowledgment.

Leading Cases on Mercantile Law. By R. S. T. Chorley, M.A., of the Inner Temple, Barrister-at-Law, Cassel Professor of Commercial Law in the University of London, and H. A. Tucker, LL.B., of the Middle Temple and Oxford Circuit, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. 1932. 8vo. xxiii and 277 pp. (9*s*. net.)

This book will be found most useful to students as a companion volume to 'Stevens's Mercantile Law' or other text-books on the subject. The cases are accurately digested, with pertinent extracts from the judgments, and followed by useful supplementary notes.

A Summary of the Law of Torts. By Sir Arthur Underhill, M.A., LL.D. Twelfth edition. By Ralph Sutton, M.A., of Lincoln's Inn, Barrister-at-Law, Reader in Common Law to the Council of Legal Education. London: Butterworth & Co. (Publishers), Ltd. 1932. 8vo. lxxi and 328 pp. (12*s.* 6*d.* net.)

The excellence of this work as a text-book for students has received our testimony on the occasion of the issue of previous editions. All we need say as to this edition is that in the competent hands of Mr. Sutton it fully maintains its established reputation. The clear statement of the law on Conspiracy in Article 72 will do much to dispel the confusion under which many students labour in trying to grope their way through the modern cases arising from trade competition.

Palmer's Company Law. With an Appendix containing the Companies Act, 1929, and the Companies (Winding-Up) Rules, 1929. Fifteenth edition. By Alfred F. Topham, LL.M., Bencher of Lincoln's Inn, One of His Majesty's Counsel, and A. M. R. Topham, B.A., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1933. clxxiv and 783 pp. (25*s.* net.)

Some important decisions reported since the issue of the last edition, such as *Hole* v. *Garnsey* [1930] A. C. 472, have been duly noted in the text and the chapter dealing with Winding-up has been amplified. The new edition, it is hardly necessary to say, maintains the excellence of the work as the leading text-book on Company Law.

Other books and publications received (some of these will be reviewed in the next issue):—

The Bell Yard. No. IX, May, 1932; No. X, November, 1932. Editors: H. E. Salt, M.A., and E. C. Robbins, LL.B. The Law Society and the Solicitors' Law Stationery Society, Ltd. Articles on 'The New Inn in Chancery Lane' and 'Tamworth's School for Chancery Clerks in 1350,' by Master Chandler; 'The Canon Law of Nullity of Marriage,' by the Principal; 'Poor Persons' Procedure,' by E. R. Cook, C.B.E.; 'The Indian States,' by J. A. Corbin. Professor Winfield contributes an exhaustive and interesting reply to the review of his book on the 'Province of the Law of Tort' by P. A. Landon, M.A. This should not be missed by anyone interested in the Law of Tort. In No. X: 'The International Congress of Comparative Law at The Hague, 1932,' by G. R. Y. Radcliffe; 'Law and Legal Education in the United States,' by H. G. Hanbury; 'Practice of Diplomacy,' by Sir John Fischer

WILLIAMS; and W. T. S. STALLYBRASS contributes an extremely able article on the highly entertaining controversy of LANDON *v.* WINFIELD.

Georgetown Law Journal. Vol. XX, Nos. 3 and 4, 1932; Vol. XXI, No. 1, 1932; No. 2, 1933. Washington: Georgetown Law Journal Association. The leading articles of interest to us are 'Shakespeare's Will,' by A. W. GREEN; 'Legal Work in the Department of State,' by G. H. HACHWORTH; 'Our Extraterritorial Court,' by C. S. LOBINGIER; 'Trusts resulting from Part Payment of the Purchase Price,' by L. E. CASSIDY; 'Imperial Constitutions of Theodosius II and the Council of Ephesus,' by F. LARDONE; 'Relation between Economics and Juridical Science,' by J. SOLTEVER; 'Sources and Influences of the Roman Law, III—VI Centuries A.D.,' by A. SCHILLER; 'Judicial and Legislative Interpretation of Freedom of Speech' (two articles), by J. H. WALSH.

Tulane Law Review. Vol. VI, Nos. 2, 3 and 4, 1932; Vol. VII, No. 1, 1932, and No. 2, 1933. Leading articles of interest to all are 'Recovery of Damages for Wrongful Death at Common Law and Civil Law,' by H. C. VOOS; 'Jottings on Comparative Legal Ideas and Institutions,' by J. H. WIGMORE; 'Liability without Fault,' by R. C. HARRIS; 'Judicial Status of Non-registered Foreign Corporations in Latin-America,' by F. RIVES and R. ARIAS; 'Lawyers' Law,' by J. C. HUTCHESON JR.; 'Air Law and Comparative Law,' by F. COSENTINI; 'International Legal Documentation,' by C. W. MEYER; 'Formation and Breach of Contract,' by PROFESSOR HOLDSWORTH; 'Declaratory Judgment,' by EDWIN M. BORCHARD. As usual, there are valuable notes on leading cases and a number of book reviews.

Some Phases of Fair Value and Inter-State Rates. By J. BARCLAY SMITH, Professor of Law. Louisiana: State University Press. 1931. 91 pp.

A British Brief: England's Reparation Victims and War Debt. By E. MOUSLEY, M.A., LL.B., Barrister-at-Law, Legal Adviser to Reparation Claims Dept., etc. London: Hutchinson & Son, Ltd., 34—36 Paternoster Row. 1932. 203 pp. (5*s.* net.)

The Rotarian. January, 1933. 211 West Wacker Drive, Chicago. (1*s.*) This contains, among other articles, an entertaining one entitled 'Are you afraid to go to Court?'

The Malayan Law Journal. Vol. I, No. 4, 1932. Singapore. ($1.25.) Leading articles are 'Criminal Procedure Code (Amendment)' and 'Gaming and Wagering Contracts.'

Le Développement Historique des 'Uses.' Jusqu'a L'Introduction du 'Trust' en Droit Anglais, par M. A. BARDE, Docteur en Droit. Vol. XXXII, 1932. Publications de L'Institut de Droit Comparé de L'Université de Paris, Librairie Rousseau, Paris. A very scholarly and painstaking research upon the history of the use. The original authorities are carefully examined in detail, and the author critically deals with the existing theories. This is a useful contribution to English legal history.

Philippine Law Journal. Vol. XII, No. 1, 1932. Leading articles are 'Theory and Application of Burden of Proof Presumptions,' by L. SUMULONG, and 'Concept of Civil Personality,' by A. V. SANTIAGO.

The Round Table. No. 90, March, 1933, contains an illuminating and interesting article on 'Foreign Law in the British Empire.' The systems prevailing are, French Law, Roman-Dutch Law, Spanish Law, and some oriental codes and customs. The basic differences between the colonial policy of Great Britain and that of European countries is well brought out.

League of Nations. Information Section. 'Arbitration in 1931.' This gives the details of the development of the procedure for the pacific settlement of disputes.

Law and Practice Relating to Incorporated Building Societies. By C. P. BEST, B.A., LL.B., Barrister-at-Law; foreword by SIR G. S. ROBERTSON, K.C., Chief Registrar of Friendly Societies. London: Pitman & Sons, Ltd. 1932. xxxii and 453 pp. (12*s.* 6*d.* net.) It deals with the constitution and status of building societies, internal administration, rights of members and their liabilities, settlement of disputes, and winding up. The Appendix contains all the relevant statutes, model rules for a building society, and a very useful arrangement with respect to income tax. The work is well arranged and up to date, and many difficulties arising out of various decisions are ably tackled. It is a very useful contribution to a subject of growing importance and difficulty.

Human Sterilization. By J. H. LANDMAN, Ph.D., J.D., J.S.D., College of City of New York. New York: Macmillan Co. 1932. xviii and 341 pp. ($4.) Deals with a difficult and interesting movement, from the historical, social, medical and legal points of view. It is a scholarly and scientific treatment of the available data on the subject, and not mere propaganda for or against sterilization.

Mischiefs of the Marriage Law. An Essay on Reform. By J. F. WORSLEY-BODEN, M.A., D.Litt. London: Williams & Norgate, Ltd. 1932. 420 pp. (21*s.* net.) The author's main thesis is that the hardships and abuse of modern marriage law are due to the permanent impress of the heavy hand of the Canon Law. He carefully deals with all the problems raised in divorce law, and doubts the advisability of adhering to domicil in connexion with annulment. He considers the law of foreign countries and gives a rationale of reform.

Aron's Notes on Proof. The Probative Law, a Commentary on Evidence. By H. G. ARON, of the United States Bar. New York: Georgic Press. 1932. xxiv and 554 pp. A practical treatise on the American Law of Evidence, wherein the learned author makes many suggestions for reform.

Divorce, Nullity and Separation. By ALFRED SKELT, Solicitor of the Supreme Court. London: Pitman & Sons, Ltd. 1932. xv and 105 pp. (5*s.* net.) A short and useful book, designed to meet the requirements of the student and the young practitioner.

Menschen und Gesetze: Deutsche Menschen deutsche Gesetze. Entwurf einer deutschen Reichsverfassung. Mit 31 Aufrissen. Von Dr. iur. Rolf Schiebold. Theodor Körner, Verlag. Altenburg, Thüringen. 1932. (RM. 7.25.)

Die Foederalistischen Staatsverfassungen Lateinamerikas. Von Carl G. Cornelius. Verlag von Franz Vahlen. Berlin. 1932. 88 pp. (No price stated.)

Der Zivilprozess Dänemarks. Von Dr. H. Munch-Petersen. J. Bensheimer, Mannheim. 1932. 222 pp. (RM. 10.)

Institut Americain De Droit et de Legislation Comparée: Etudes et Documents. Serie Française No. 1: Code International Du Travail Intellectuel—Les Droits d'Auteur. 144 pp. Serie Française No. 3: Le Droit Comparé et L' ' American Common Law.' 20 pp. Serie Castellana No. 4: Constitucion Tipica para Mexico y la America Latina en 500 Articulos. 152 pp. Imp. 'Rivadeneyra,' S.A. Mexico. 1932.

Handbook of the Cambridge Law School, 1932—3. Printed for the Law Faculty Board. 140 pp. (2*s.* 6*d.*)

Tax Lists and Transportation Receipts from Theadelphia. Edited with Introductions and Notes by W. L. Westermann, Professor of Ancient History, Columbia University, and Clinton Walker Keyes, Associate Professor of Greek and Latin, Columbia University. New York: Columbia University Press. 1932. 4to. xi and 219 pp. (40*s.* net.)

Staat und Selbstverwaltung in England. Die Kommunalaufsicht der Zentralbehörden. Von Dr. Adolf Schüle. Carl Heymanns Verlag in Berlin, W.8. 1933. 256 pp. (RM. 12.30.)

Die Familiengemeinschaften der Angelsachsen. Von Dr. Jacob Braude. Verlag von S. Hirzel in Leipzig. 1932. 106 pp. (RM. 5.30.)

The French Law of Wills, Probate, Administration and Death Duties of the Estates of English Decedents leaving Property in France. By Pierre Pellerin. 3rd ed. London: Stevens & Sons, Ltd. 1933. 95 pp. (7*s.* 6*d.*)

Roman Law in the Later Roman Empire. The Isaurian Period, Eighth Century. The Ecloga. By E. H. Freshfield, M.A., LL.D. Cambridge: Bowes & Bowes. 1932. 78 pp. (3*s.* 6*d.*) Dr. Freshfield has done much valuable work in his translations of the Ecloga and other Eastern compilations of Roman Law. The present short sketch of the law during the Isaurian Period will be welcomed by many students as supplementing the account of Western developments in Prof. Vinogradoff's 'Roman Law in Medieval Europe.'

International Guarantees of Minority Rights. By Julius Stone. Oxford University Press. 1932. 8vo. xiii and 288 pp. (14*s.*)

The Religious Foundations of Internationalism. A Study in International Relations through the Ages. By NORMAN BENTWICH. London: George Allen & Unwin, Ltd. 1933. 8vo. 288 pp. (10*s.* 6*d.*)

Gibson's Conveyancing. Fourteenth Edition. By ARTHUR WELDON and H. GIBSON RIVINGTON, M.A., Oxon. London: *Law Notes* Publishing Offices. 1933. 767 pp. (£2.) This admirable work has long been regarded as the *vade mecum* of the student of the English law of conveyancing. The present edition has been prepared with the meticulous care which has been characteristic of previous editions, and nothing of importance to students has been omitted or overlooked, so far as we have been able to observe.

The Modern Law of Real Property. Third Edition. By G. C. CHESHIRE, D.C.L., M.A. London: Butterworth & Co. (Publishers), Ltd. 1933. xlvi and 837 pp., with Index 62 pp. (30*s.* net.) It may be said that this work has now become the established text-book at the Universities, if not elswhere. The present edition was received too late to allow of an elaborate examination and review, which will follow in due course.

The Constitutional Law of the British Dominions. By A. B. KEITH, D.C.L., D.Litt. London: Macmillan & Co., Ltd. 1933. ix and 522 pp. (18*s.* net.) The Statute of Westminster, 1931, and recent developments in the political and economical relations of Great Britain and the Dominions have raised most important and critical questions affecting the constitutional position of Great Britain with regard to the Dominions and of the Dominions *inter se.* This new work by Professor Berriedale Keith, enlarging on his earlier work 'The Sovereignty of the British Dominions,' will do much to elucidate the problems which naturally present themselves in circumstances for which there is necessarily very little in the way of precedent to supply guidance to the student.

An International Air Force. By J. M. SPAIGHT, C.B.E., LL.D. London: Gale & Polden, Ltd. 115 pp. (5*s.*)

Anders Sandøe Orsted as a Jurist. By FRANTZ DAHL, Dr. Juris. London: Williams & Norgate, Ltd. 1932. 48 pp.

Das Problem der einstweiligen Verfügung in der deutschen Reichsstaatsgerichtsbarkeit. By DR. ADOLF SCHÜLE. Berlin: Carl Heymanns Verlag. 1932. 92 pp.

The Road to the Law. By D. C. LUNT. McGraw-Hill Publishing Co.

Die Zukunft der Rechtswissenschaft. By Von Dr. W. FUCHS.